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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 598.

ERNEST LIPKE, APPELLANT,

vs.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 31, 1921.

(32,561)

(28,551)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 596.

ERNEST LIPKE, APPELLANT,

vs.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 17, 1921.

In the District Court of the United States for the Eastern District of Pennsylvania, March Term, 1921.

No. 2303.

ERNEST LIPKE

vs.

EPHRAIM LEDERER, Collector of Internal Revenue.

Francis J. Maneely.
Lincoln L. Eyre.
George W. Coles.

Docket Entries.

May	25, 1921.	Bill of Complaint filed.
"	25, "	Subpœna exit—returnable June 14, 1921.
"	31, "	Notice of Motion for Order dismissing Bill of Complaint, filed.
June	15, 1921.	Subpœna returned: May 26: served, and filed.
July	6, 1921.	Opinion, Dickinson J., granting Motion to dismiss Bill of Complaint and denying Motion for Restraining Order, and granting Exceptions to Plaintiff, filed.
"	30, "	Decree dismissing Bill of Complaint and denying Motion for Restraining Order, filed.
"	30, "	Assignments of Error, filed.
"	30, "	Petition for Appeal, filed.
"	30, "	Order of Court granting prayer of petition, filed.
Aug.	15, 1921.	Bond for costs sur Appeal with Southern Surety Co. of Des Moines, Iowa, surety, filed.
"	15, "	Order of Court approving Bond for costs, filed.
"	15, "	Præcipe for Transcript of Record, filed.
"	15, "	Citation allowed and issued.
"	20, "	Citation returned "service accepted" and filed.

2 In the District Court of the United States for the Easte
District of Pennsylvania, March Term, 1921.

In Equity.

No. 2303.

ERNEST LIPKE

vs.

EPHRAIM LEDERER, Collector of Internal Revenue for the First D
trict of Pennsylvania.

Plaintiff's Bill.

(Filed May 25, 1921.)

To the Honorable the Judges of said Court:

Your orator complains and says:

1. That your orator is the holder of a retail liquor license f
premises at York and Natrona Streets, in the City of Philadelph
State of Pennsylvania, said license having been granted to him
the Court of Quarter Sessions for the County of Philadelphia for t
license year expiring May 31st, 1921, and was similarly licensed f
said premises in previous years last past.

3 2. Your orator avers that on or before June 24th, 19
he paid the defendant as Collector of Internal Revenue, t
sum of twenty-five dollars in full of all taxes required by the I
ternal Revenue laws for the year ending June 30th, 1920.

3. On December 29, 1920, your orator was arrested at the instan
of the Prohibition Enforcement Agents of the United States Go
ernment for an alleged unlawful sale of liquor containing more th
one-half of one per cent. of alcohol by volume, in violation of t
Act of Congress of the United States, passed on October 28th, 19
commonly known as the "National Prohibition Act," and otherwi
known as the "Volstead Act" and was held by United States Co
missioner Manley under bail for the District Court of the Unit
States for the Eastern District of Pennsylvania to appear and a
swer in said court before said Court and a jury upon said charge.

4. The said prosecution is still pending, so far as your orat
knows or has been able to ascertain.

5. The charge upon which your orator was arrested as aforesa
is, in express terms, subject to the provisions of Section 2, of sa
Volstead Act, requiring the Commissioner of Internal Revenue
"swear out warrants before United States Commissioners or other
ficers or Courts authorized to issue the same for the apprehension
such offenders, and may, subject to the control of the said Unit

States Attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a Grand Jury." Then, said Section 2, further provides that "Section
4 1014, of the Revised Statutes of the United States is hereby made applicable in the enforcement of this act." Section 1014, of the Revised Statutes provides for the punishment of offenses of this nature in and by the Courts of the United States. By Section 29 of said Volstead Act, the illegal sale of liquor in violation of the provisions of said act is made punishable, for a first offense, by a fine of not more than $1,000 or imprisonment not exceeding six months, and for a second or subsequent offense, by a fine of not less than $200 or more than $2,000 and an imprisonment of not less than one month or more than five years.

6. On March 18th, 1921, your orator received a paper, partly printed and partly typewritten, from the defendant, as Collector of Internal Revenue, entitled "Notice and Demand for Tax" calling upon your orator to pay the sum of $557.29, made up of three items, one of $45.83 for "double tax" under Section 35 of the said Volstead Act, another of $11.46 "penalty" under Section 3244 of the Revised Statutes and another of $500.00 "special penalty" under Section 35 of the said Volstead Act.

On March 31st, 1921, your orator received another paper from the defendant, as Collector of Internal Revenue entitled "Second Notice and Demand for Tax" calling upon him again to pay said sum of $557.29 made up of said three items and was therein notified that if said amounts were not paid within ten days of its date, collection of same would be made by seizure and sale of your orator's property. Full and correct copies of said notices are hereto attached and to be taken as a part of this bill.

5 7. Your orator avers that the only authority given for the issuance of said so-called tax bills or notices is as stated upon said bills or notices as Section 3244, of the Revised Statutes and Section 35, of the said Volstead Act. Your orator has been advised and avers that Section 3244 of the Revised Statutes has no application whatever in its terms to the present proceedings, referring, as it does, to an entirely different subject-matter. If any authority could possibly be said to be derived from Section 35 of said Volstead Act, your orator is further advised, believes and avers that the language of said Section 35 is so vague and indefinite as to confer no such authority as has been assumed by the defendant, as Collector of Internal Revenue, in the premises. Said Section 35 is as follows:

"Section 35. All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manu-

facture or sale, a tax shall be assessed against, and collected fro
the person responsible for such illegal manufacture or sale in dou
the amount now provided by law, with an additional penalty
$500 on retail dealers and $1,000 on manufacturers. The payme
of such tax or penalty shall give no right to engage in the ma
facture or sale of such liquor, or relieve any one from cri
6 inal liability, nor shall this act relieve any person from a
liability, civil or criminal, heretofore or hereafter incurr
under existing laws.

"The commissioner, with the approval of the Secretary of t
Treasury, may compromise any civil cause arising under this ti
before bringing action in court; and with the approval of the
torney-General he may compromise any such cause after acti
thereon has been commenced."

8. Your orator further has been advised and avers that if s
Section 35 has any intelligent meaning at all it is intended
confer upon the Commissioner of Internal Revenue, acting throu
the defendant, the power of inflicting a punishment for the comm
sion of a criminal offense, viz: The illegal sale of liquor, under t
subterfuge or guise of taxation. Your orator having paid his ta
in full at the time and for the amount required by the Inter
Revenue law is not subject to be penalized for any non-payment
taxes or any delay in the payment thereof but, by the meth
adopted, is punished by a fine or penalty for the commission of
criminal offense without hearing, information, indictment or tr
by jury in violation of Articles IV, V and VI, of the Amendmen
to the Constitution of the United States. If any such meaning
to be given to said Section 35, your orator is advised and respe
fully submits that said Section 35 is unconstitutional, null and vo

9. In addition to the notice printed on said so-called tax bi
that the property of your orator will be seized and sold for n
payment, your orator has been informed by officials of t
7 defendant department that after the expiration of ten da
from the rendition of said second notices, his property w
be seized and sold by warrant of distress, for which there is no a
thority or provision whatever in said Section 35, of said Volste
Act, and the only authority for so doing is conferred by the Revis
Statutes applicable exclusively to cases of failure to pay Inter
Revenue Tax.

10. Your orator avers that he is now subject, at any moment
have the defendant, as Collector of Internal Revenue, seize his pr
erty, real or personal, for the non-payment of said fines and pen
ties and that he is wholly without adequate remedy at law to p
vent such seizure of his property.

Your orator therefore respectfully prays:

1. That your Honorable Court will grant an injunction, spec
until hearing and perpetual thereafter, restraining and enjoini
the defendant as Collector of Internal Revenue, from filing in yo

Honorable Court any tax liens against the complainant by virtue of said so-called tax bills.

2. That your Honorable Court will grant an injunction, special until hearing and perpetual thereafter, restraining and enjoining the defendant as Collector of Internal Revenue, from proceeding to collect said so-called tax bills by warrant of seizure, distress or sale or otherwise.

3. Your Honorable Court will grant a mandatory injunction upon the defendant as Collector of Internal Revenue, to mark off and cancel said so-called tax bills from his records.

8 4. Further relief.

(Signed) FRANCIS J. MANEELY,
(Signed) LINCOLN L. EYRE,
Solicitors for Complainant.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Ernest Lipke, being duly sworn, says that he is the complainant above-named and that the facts set forth in his foregoing bill of complaint so far as they are derived from his own knowledge are true, and so far as they are derived from information, he believes to be true.

(Signed) ERNEST LIPKE.

Sworn to and subscribed before me this 24th day of May, A. D. 1921.

[SEAL.] (Signed) GILBERT W. LUDWIG,
Deputy Clerk District Court United States,
Eastern District of Pennsylvania.

9 Form 1-17 B.

Treasury Department.

U. S. Internal Revenue.

Notice and Demand for Tax.

(Prohibition—Narcotics.)

United States Internal Revenue Service.

Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within 10 days after date of this notice, a penalty of 5 per cent of the amount of tax due will be added, plus interest at the rate of 1 per cent per month until paid.

Dated March 18, 1921.

E. LEDERER,
Collector of Internal Revenue.

To avoid penalty and interest this tax must be paid to the Collector of Internal Revenue at Phila. Pa. within 10 days from date stated above.

Date —— ——.

To the Collector of Internal Revenue:

I inclose herewith the sum of $— in payment of tax shown below.

Name: —— ——,

Address: —— ——.

Collector's "Paid" Stamp.

10 Name and address.	Description.	Assessment.	Paid.	Amt. due.
Lipke, Ernest York & Natrona Sts., Philadelphia, Pa. ...	R. L. D. Sec. 35 D. T.	45.83	....	....
	11 Mos. 21 3244 P.	11.46	....	....
	S. F. P. A. 1-26-21 S. P.	500.00	....	....
				557.29

M. R. 15/7.

Return this form with remittance.

11 Form 1—21B.

Treasury Department.

U. S. Internal Revenue.

Second Notice and Demand for Tax.

(Prohibition—Narcotics.)

United States Internal Revenue Service.

Demand is hereby made for the payment of the taxes stated this notice with a penalty of 5 per cent which has been incurred failure to pay such taxes within the prescribed time. Beginning the due date stated below, interest will also accrue at the rate o per cent per month until paid. If payment of tax and penalty not received within 10 days, collection of the same, with any accr interests thereon and costs, shall be made by seizure and sale property.

Due Date—March 31, 1921.

EPHRAIM LEDERER

To avoid seizure and sale of property this tax must be paid Collector of Internal Revenue at Phila., Pa., within 10 days fr date stated above.

To the Collector of Internal Revenue:

I inclose herewith remittance covering tax, penalties, and inter as follows:

Amt. due as shown below	$557.
Penalty 5%	27.
Int. — Mos.	...
Total	$585.

Date —— —, ——.

Collector's "Paid" Stamp.

—— ——

(Signature of Taxpayer.)

12 Name and address.	Description.	Assessment.	Paid.	Amt. due.
Lipke, Ernest York & Natrona Sts., Philadelphia, Pa. ...	R. L. D. Sec. 35 D. T.	45.83	....	....
	11 Mos. 21 P.	11.46	....	....
	S. F. P. A. 1-26-21 S. P.	500.00	....	....
				557.29

M. R. 15/7.

Return this form with remittance.

13 In the District Court of the United States for the Eastern District of Pennsylvania, March Term, 1921.

In Equity.

No. 2303.

ERNEST LIPKE

vs.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania.

Notice of Motion to Dismiss.

(Filed May 31, 1921.)

SIR:

Please take notice, That upon the bill of Complaint herein, which was filed in the office of the Clerk of this Court on the 25th day of May, 1921, I shall move this court on Tuesday, June 14, 1921, at the opening of court on that day, or so soon thereafter as counsel can be heard, for an order dismissing said Bill of Complaint for want of equity, want of jurisdiction, and for such other and further relief in the premises as may seem just.

CHARLES D. McAVOY,
United States Attorney,

(Sgd.) By WEBSTER S. ACHEY,
Special Ass't U. S. Attorney.

To Ernest Lipke, Plaintiff.

14 In the District Court of the United States for the Eastern District of Pennsylvania, March Sessions, 1921.

No. 2303.

ERNEST LIPKE

vs.

EPHRAIM LEDERER, Collector.

Injunction Bill.

Opinion Sur Motion for Restraining Order and Preliminary Injunction and to Dismiss Bill.

(Filed July 6, 1921.)

DICKINSON, *J.:*

The main question raised is the same as that raised in the case of Ketterer vs. Lederer before ruled.

An excise tax was levied and assessed, and the effort is being made to collect it. The legal justness of the tax levy is denied. The defendant has the opportunity given in all tax cases to dispute the legality of the tax levy by paying the tax and bringing an action to recover the sum paid. This course has not been followed, but the present plaintiff asks to have the collection of the tax restrained. The Acts of Congress deny this right to the plaintiff, if what is sought to be collected as a tax is a tax. The plaintiff asserts this is not a tax but is a penalty for an alleged crime, payment of which is sought to be exacted under the guise of a tax.

Broadly stated, the question then becomes this, whether a trial Court should find that Congress was doing one thing notwithstanding the Congressional declaration that it was doing something else.

This question has already been ruled so far as we are concerned by a refusal to make such a finding.

The question is now presented from a somewhat different angle. An excise or internal revenue tax, as it is called, is really a license fee, or, in other words, it is a contribution to the public exchequer for the privilege of following some occupation, calling, business or profession. The point made is that the right to do the business to which this levy pertains is denied by the very Act which directs the levy. This is true, but none the less there is nothing in this which of itself would deny the power of Congress to levy an excise tax based upon the fact that the taxpayer had followed a particular business, the tax being levied at the close of the period. The exaction of an excise tax covering a time past would not be affected by the further fact that the business, in respect to which the tax had been assessed, was thereafter and in the future forbidden.

As yet the present plaintiff has been convicted of no offence. In consequence he has not incurred any imposed penalty for such offence, and the penalty cannot be imposed through the subterfuge of calling it a tax. All this is clear enough.

On the other hand, the possession of the power to levy and assess excise taxes cannot be denied to Congress. The real question is which is being done?

A somewhat analagous dilemma is presented by those cases in which Congress had no lawful power to prohibit but does have a lawful power to tax. A tax which is prohibitive is laid. Congress has both prohibited and taxed. What it did, however, it declared the levying of a tax. For a trial Court to find the fact to be otherwise might result in embarrassment to the Government. The question is properly one to be referred to an appellate Court of general jurisdiction.

The motion to dismiss is based upon a state of facts not in controversy, and is granted. This carries with it a denial of the other motions. Exceptions allowed to plaintiff.

17 In the District Court of the United States for the Eastern District of Pennsylvania, March Term, 1921.

In Equity.

No. 2303.

ERNEST LIPKE, Complainant,

vs.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania.

Final Decree.

(Filed July 30, 1921.)

This cause came on to be heard at this term on motion by the Complainant for a restraining order and for a preliminary injunction pendente lite and on motion by the defendant to dismiss the bill of complaint and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed as follows:

That the motion by the complainant for a preliminary injunction pendente lite be, and the same hereby is denied.

And it is further

Ordered, adjudged and decreed:

That the motion of the defendant to dismiss the bill of complaint be and the same hereby is granted and that the bill of complaint herein be and the same hereby is dismissed with costs to the defendant to be taxed.

By the court:

(Sgd.) DICKINSON,
U. S. D. J.

18 In the District Court of the United States for the Eastern District of Pennsylvania, March Term, 1921.

In Equity.

No. 2303.

ERNEST LIPKE

vs.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania.

Petition for Appeal.

(Filed July 30, 1921.)

The complainant above named, Ernest Lipke, conceiving himself aggrieved by the Judgment or Decree made and entered in the above entitled cause on the 30th day of July, 1921, does hereby appeal from such Judgment or Decree to the Supreme Court of the United States, for the reasons specified in the Assignments of Error which are filed herewith.

And the said Ernest Lipke prays that he be allowed this Appeal and that a transcript of the records, papers and proceedings upon which said Judgment or Decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

(Sgd.) FRANCIS J. MANEELY,
" LINCOLN L. EYRE,
Solicitors for Complainant.

405 Pennsylvania Building, Philadelphia, Pennsylvania.

Dated: Philadelphia, Pennsylvania, July 30, 1921.

19 *Order Allowing Appeal.*

(Filed July 30, 1921.)

Appeal allowed. Security in $200.00 to be entered.
By the Court.
(Sgd.) DICKINSON,
District Judge.

In the District Court of the United States for the Eastern District of Pennsylvania, March Term, 1921.

In Equity.

No. 2303.

ERNEST LIPKE

vs.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania.

Assignments of Error.

(Filed July 30, 1921.)

Now comes the complainant, Ernest Lipke, and files the following assignments of error upon which he will rely on his appeal from the judgment or decree in equity entered herein on the 30th day of July, 1921.

1. That the Court erred in denying the Complainant's motion for a preliminary injunction.

2. That the Court erred in dismissing the Bill of Complaint.

3. That the Court erred in holding that Section 35 of Title II of the Act of Congress of October 28, 1919, known as the "National Prohibition Act", so far as it seeks to assess a so-called tax and penalties thereon, not for any deliquency in the payment
21 of taxes, but only as a punishment for the alleged unlawful sale of intoxicating liquor, is constitutional and valid.

4. Because the Court erred in not holding that so much of Section 35 of Title II of the Act of October 28, 1919, as permits the levy of a tax solely as punishment for the alleged commission of a crime, is unconstitutional and void.

5. Because the Court, by its denial of a preliminary injunction and by its dismissal of the Bill of Complaint, erred in holding that the defendant, as Collector of Internal Revenue, had any authority to enforce the collection of a so-called tax, as punishment for the commission of an alleged crime, by levy and sale of complainant's property under and by virtue of Sections 3186 to 3197 inclusive of the Revised Statutes, applying as they do, specifically and exclusively to lawful taxation of a lawful business, conducted prior to the passage of the Eighteenth Amendment and only for some delinquency or irregularity in the payment of such tax and not as a punishment for the alleged commission of a crime.

6. Because the Court erred in not holding that Section 35 of Title II, of the Act of October 28, 1919, is unconstitutional and void,

because it deprives the complainant of all due process of law and all fundamental rights reserved to all persons charged with crime by Articles IV, V and VI of the Amendments to the Constitution of the United States.

Wherefore, Complainant-appellant prays that the said Decree of the United States District Court for the Eastern District of Pennsylvania be reversed and that relief be granted him as prayed for in his bill of complaint, and for such other and further re-
22 lief as to the Court may seem just and proper.

(Sgd.) FRANCIS J. MANEELY,
LINCOLN L. EYRE,
Solicitors for Complainant-Appellant.

405 Pennsylvania Building, Philadelphia, Pennsylvania.

23 In the District Court of the United States for the Eastern District of Pennsylvania, March Term, 1921.

In Equity.

No. 2303.

ERNEST LIPKE

vs.

EPHRAIM LEDERER, Collector of Internal Revenue.

Præcipe for Transcript of Record.

(Filed Aug. 15, 1921.)

To Clerk D. C. U. S., E. D. of Pa.:

In making up the record in the above case, sur appeal to Supreme Court of the United States, the following should be included:

Docket entries.
Complainant's Bill.
Defendant's Motion to Dismiss.
Opinion of the Court.
Final Decree.
Assignments of Error.
Appeal and Allowance.

(Sgd.) LINCOLN L. EYRE,
Solicitor for Complainant.

24 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, George Brodbeck, Clerk of the District Court of the Un
States for the Eastern District of Pennsylvania, do hereby cer
that the annexed and foregoing is a true and faithful copy o
much of the pleas and proceedings; in the case of Ernest Li
Complainant, vs. Ephraim Lederer, Collector of Internal Reve
Defendant, No. 2303 March Term, 1921; as per præcipe filed, a c
of which is hereto annexed, the transcript of record in the al
entitled case is to include, and now remaining among the rec
of the said court in my office.

In testimony whereof I have hereunto subscribed my name
affixed the seal of the said District Court at Philadelphia, this 3
day of August in the year of our Lord one thousand, nine hun
and twenty-one and in the one hundred and forty-sixth year of
Independence of the United States.

[Seal of the District Court of the United States, E. D.
Penna.]

GEORGE BRODBECK,
Cler

Endorsed on cover: File No. 28,551. E. Pennsylvania D. C. U
Term No. 596. Ernest Lipke, appellant, vs. Ephraim Lederer,
lector of internal revenue for the first district of Pennsylvania. F
October 26th, 1921. File No. 28,551.

MAR 18 1922
WM. R. STANSBURY
Clerk

No. 396. October Term, 1921.

IN THE

SUPREME COURT OF THE UNITED STATES

ERNEST LIPKE,

Appellant,

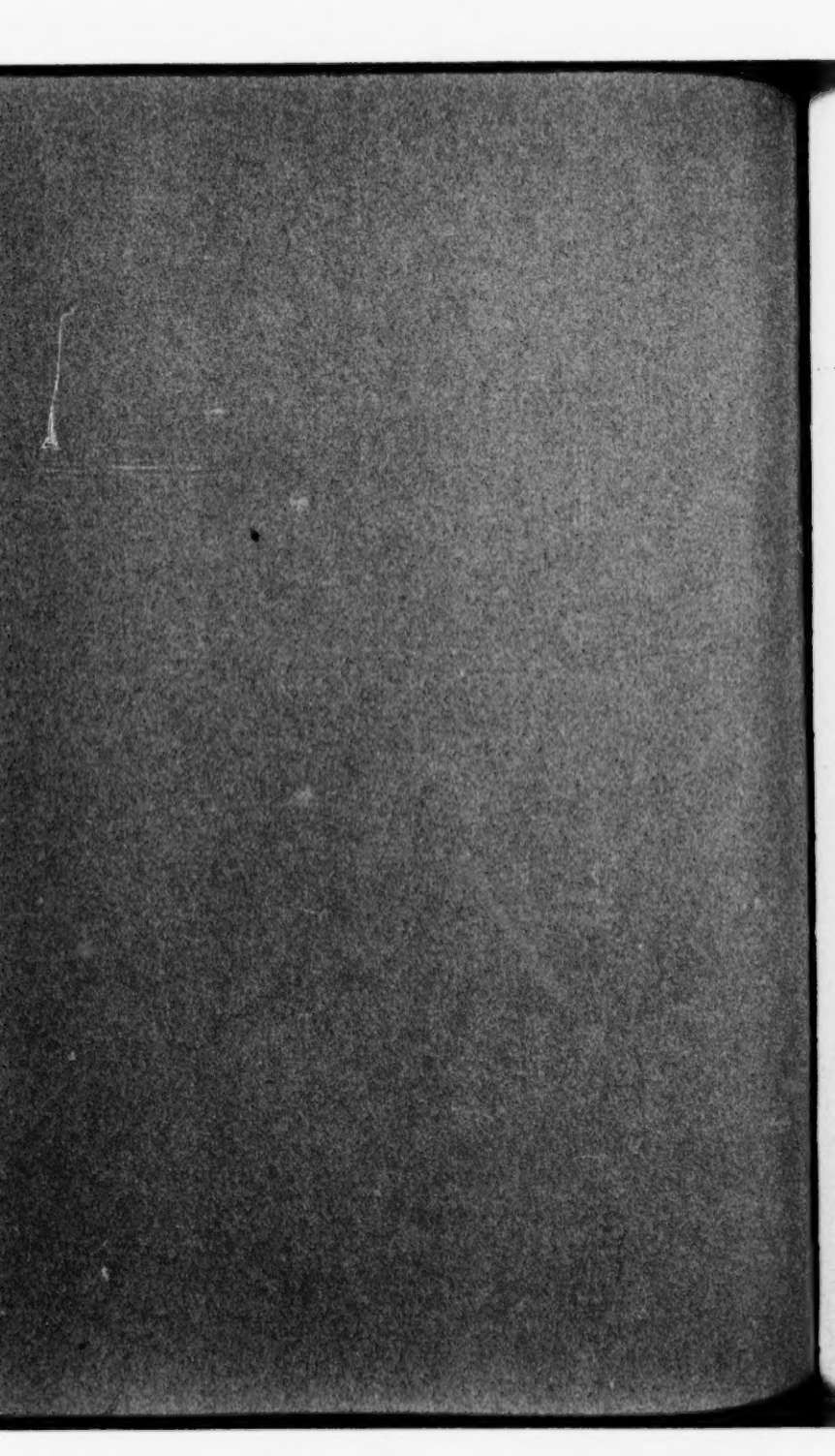
vs.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Brief of Ernest Lipke, Appellant.

Francis J. Heazel,
Lincoln L. Eyre,
Attorneys for Appellant.



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IN THE

Supreme Court of the United States.

October Term, 1921. No. 596.

ERNEST LIPKE,
Appellant,

vs.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF ERNEST LIPKE, APPELLANT.

STATEMENT OF THE CASE.

This appeal brings to this Court for its construction as applied to the facts hereinafter set forth, Section 35 of Title II of the Act of Congress of October 28th, 1919, commonly known as the "National Prohibition Act" and otherwise known as the "Volstead Act."

Section 35 reads as follows:

> "All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale, a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor or relieve any one from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.
>
> The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court: and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced."

At the time this suit was instituted the appellant was, and still is, the holder of a retail liquor license in the City of Philadelphia granted him in accordance with the laws of the State of Pennsylvania, and had paid in full the tax required by the Internal Revenue law.

On March 18th, 1921, he received a written notice from the defendant as Collector of Internal Revenue entitled, "Notice and Demand for Tax", calling upon

him to pay the sum of $557.29 made up of three items, one for $45.83 for "double tax" under Section 35 of the said Volstead Act, another for $11.46 "penalty" under Section 3244 of the Revised Statutes and another for $500.00 "special penalty" under Section 35 of the said Volstead Act.

No previous demand had been ever made upon him for the payment of any federal tax.

On March 31st, 1921, he received another written notice from the defendant, as Collector, entitled "Second Notice and Demand for Tax" calling upon him to pay the same amount, made up of the same three items, and he was therein further notified that if said amounts were not paid within ten days of the date of said notice, collection of same would be made "by seizure and sale of property".

Full copies of these notices are attached as exhibits to the appellant's bill in equity, and may be found on pages 5 to 9 of the Transcript of Record.

These so-called tax and penalty assessments contained no explanation as to why they were made. The recipient was left wholly in the dark as to any specific fact or thing for which he was held responsible to pay the money called for. The item of $45.83 was noted as "R. L. D. Section 35 D. T.". It may be surmised, though not otherwise explained, that this means, "Retail Liquor Dealer, Section 35, of Title II, of the Volstead Act, Double Tax". Assuming this to be the correct explanation and the recipient not being delinquent in the payment of any taxes, it is evident that this assessment is for the violation of some provision or provisions of the Volstead Act, the nature of which is not communicated to the person who is assessed. The second item is still more vague. It is "11 Mos. 21 3244 P. 11.46" which may perhaps be deciphered as a pen-

alty under section 3244 of the Revised Statues, which, however, contains no provision anywhere for the payment of the sum of $11.46 as a penalty. The third item is "S. F. P. A 1-26-21 S. P. $500.00" We do not know what "S. F. P. A." means. The rest of this item apparently is "January 26th, 1921, Special Penalty, $500.00" and is supposably the penalty prescribed by Section 35 of Title II of the Volstead Act, imposed for the violation of some provision of that Act, again not otherwise explained or specified.

A bill in equity was filed by the appellant in the District Court of the United States for the Eastern District of Pennsylvania in which the above facts were set forth and in which it was further alleged that the complainant, following the receipt of these assessments, was informed and notified that, upon failure to pay the money demanded, his property would be seized by a warrant of distress, and sold to satisfy said warrant.

The bill prayed for an injunction to (a) restrain the filing of tax liens upon complainant's real estate, (b) to restrain the collection of these so-called tax assessments by warrant of distress and sale thereunder and (c) to mark off the record and cancel any tax liens already entered.

These prayers were based upon the following grounds:

1. That the so-called taxes and penalties were in fact fines for punishment of a crime, viz: the alleged violation of some provision of the Volstead Act.

2. That, whether as taxes or as fines these sums were charged to the alleged offender and sought to be collected by seizure and sale of his property without due process of law: without any information to him

as to what his offense was: without hearing or trial or any day in any Court whatsoever.

3. That the delivery to the alleged offender of the so-called tax bill was, in truth and fact, the announcement of the imposition of a sentence, in the nature of a fine, upon conviction of the alleged offender by an executive officer, to wit, the Commissioner of Internal Revenue, upon secret evidence satisfactory to himself only, with no opportunity to the alleged offender to disprove the accusation of crime made against him or of setting aside the conviction.

Upon motion of the defendant to dismiss the bill, the learned Judge of the Court below entered an order dismissing the bill and filed an opinion (pages 10 and 11, Transcript of Record), which concluded with the following language.

> "As yet the present plaintiff has been convicted of no offense. In consequence he has not incurred any imposed penalty for such offense, and the penalty cannot be imposed through the subterfuge of calling it a tax. All this is clear enough. On the other hand, the possession of the power to levy and assess excise taxes cannot be denied to Congress. The real question is which is being done?
>
> A somewhat analogous dilemma is presented by those cases in which Congress had no lawful power to prohibit but does have a lawful power to tax. A tax which is prohibitive is laid. Congress has both prohibited and taxed. What it did, however, it declared the levying of a tax. **For a trial Court to find the fact to be otherwise might result in embarrassment to the Government. The question is properly one to be referred to an Appellate Court of general jurisdiction.**"

From this Judgment of the Court below this appeal was taken to this Court.

THE ESSENTIAL QUESTIONS INVOLVED.

1. Are not the so-called taxes and penalties, called for by Section 35, of Title II, of the Volstead Act, in truth and fact fines for the violation of the provisions of that Act?

2. Can these so-called taxes and penalties be collected by distraint and sale under Section 3187 of the Revised Statutes?

3. Is not the collection of these so-called taxes and penalties in the manner proposed, in violation of Articles IV, V and VI of the Constitution of the United States?

4. Are these so-called taxes included in the provisions of Section 3224 of the Revised Statutes, prohibiting suits to restrain their assessment or collection?

5. Are the penalties sought to be collected, in any sense included in the provisions of Section 3224 of the Revised Statutes, prohibiting suits to restrain their assessment or collection?

SPECIFICATION OF ERRORS.

First: The District Court of the United States for the Eastern District of Pennsylvania erred in denying the complainant's motion for a preliminary injunction, the order of the Court being as follows:

> "This cause came on to be heard at this term on motion by the Complainant for a restraining order and for a preliminary injunction pendente lite and on motion by the defendant to dismiss the bill of complainant, and was argued by counsel, and thereupon, upon consideration thereof, it is
>
> Ordered, adjudged and decreed as follows:
>
> That the motion by the complainant for a preliminary injunction pendente lite be, and the same hereby is denied.
>
> (Exception granted to complainant.)"

Second: Because the Court below erred in dismissing the Bill of Complainant, the order of the Court being as follows:

> "This cause came on to be heard at this term on motion by the Complainant for a restraining order and for a preliminary injunction pendente lite and on motion by the defendant to dismiss the bill of complaint and was argued by counsel, and thereupon upon consideration thereof, it is
>
> Ordered, adjudged and decreed as follows:
>
> That the motion by the complainant for a preliminary injunction pendente lite be, and the same hereby is denied.
>
> And it is further
>
> Ordered, adjudged and decreed:
>
> That the motion of the defendant to dismiss the bill of complaint be and the same hereby is granted and that the bill of complaint herein be and the same hereby is dismissed with costs to the defendant to be taxed."
>
> (Exception granted to complainant.)

ARGUMENT.

We will discuss this case under four heads:

I. These so-called taxes and penalties are, in fact, fines for the punishment of criminal offenses.

II. The collection of these fines by the method adopted in this case is in violation of Articles IV, V and VI of the Amendments to the Federal Constitution.

III. There is no authority for the collection of these so-called taxes and penalties by distress and sale, either in the Volstead Act or in prior laws.

IV. The remedy by injunction is proper.

Before discussing these questions under their separate headings, we call attention to the decisions rendered in some Federal Districts and by the Circuit Court of Appeals for the Fifth Circuit in other cases of a similar character.

In the following cases the Courts granted injunctions to restrain the collection of the so-called taxes and penalties by distress and sale:

Kausch vs. Moore, 268 Fed. Rep. 668.
(District Court, Eastern District of Missouri.)
Accardo vs. Fontenot, 269 Fed. Rep. 447.
(District Court, Eastern District of Louisiana.)
(Affirmed by the Circuit Court of Appeals for the 5th Circuit on February 15th, 1922. Not yet reported.)
Thome vs. Lynch, 269 Fed. Rep. 995.
(District Court, District of Minnesota.)
Connelly vs. Gardner, 272 Fed. Rep. 911.
(District Court, Eastern District of New York.)
Kelly vs. Lewellyn, 274 Fed. Rep. 112.
(District Court, Western District of Pennsylvania.)
Ledbetter vs. Bailey, 274 Fed. Rep. 375.
(District Court, Western District of North Carolina.)

The following case is the only one in which a contrary decision was directly rendered:

Pumilli vs. Riordan, 275 Fed. Rep. 846.
(District Court, Western District of New York.)

In the following cases all decided by Judge Dick-

inson, District Court for the Eastern District of Pennsylvania, the Judge declines to pass upon the question directly, stating that in his opinion a question of this kind should be passed upon by a Court of appellate jurisdiction.

Ketterer vs. Lederer, 269 Fed. Rep. 153,
Wassell vs. Lederer, 274 Fed. Rep. 489,
Lipke vs. Lederer, 274 Fed Rep. 493.
(The case at bar.)

I. THE TAX AND PENALTY IMPOSED BY SECTION 35 OF THE VOLSTEAD ACT, TITLE II, ARE, IN FACT, FINES FOR THE PUNISHMENT OF A CRIME.

A tax has been defined by this Court in New Jersey vs. Anderson, 203 U. S. 492, as "a pecuniary burden laid upon individuals or property for the purpose of supporting the Government".

And in Houck vs. Little River District, 239 U. S. 254, as "an enforced contribution for the payment of public expenses".

A penalty on the other hand is in the nature of a punishment.

Helwig vs. United States, 188 U. S. 605.

It may be called a tax and yet be a penalty. Its name does not determine its nature. Id. 611, 613:

> "The Volstead Act, passed to enforce the eighteenth amendment is a penal statute. It is not a revenue measure. Whatever charges still remain upon prohibited beverages are imposed for the purpose of preventing the manufacture and sale thereof."

From the opinion of the Circuit Court of Appeals, in Fontenot vs. Accardo, supra.

Again in the same opinion it is said:

"The fact that Section 35 of the Act does not provide for notice is persuasive that it was intended to assess penalties, to be enforced in the usual way by fine or by suit."

And again the same Court said:

"It will be noted that Section 35 of the Act authorizes an assessment not upon liquor, but upon the illegal manufacture or sale of liquor. That is made clear by the provisions that payment of the tax or penalty shall not be made in advance, and when made shall give no right to engage in the manufacture or sale of liquor. A license to engage in the business of a manufacturer of liquor, or in that of a retail liquor dealer, cannot any longer be obtained. The Act so declared, and a license for such a business would be inconsistent with the whole purpose of the Eighteenth Amendment. A license tax is something which one who engages in a lawful business or occupation may be obliged to pay. When the occupation is made unlawful, the license tax thereon is no longer collectible, but, is repealed. The Act does not anywhere levy any taxes, and its whole purpose is inconsistent with the theory that it was intended to continue license taxes upon manufacturers or retail liquor dealers. Section 35 is consistent with the general purpose of the Act to prohibit, to punish, to forfeit and to assess penalties. We do not think therefore, that the assessments here involved were tax assessments."

"Whether a particular contribution, charge or burden is to be regarded as a tax depends upon its real nature in view of these essential characteristics, and if it is in its nature a tax it is not material that it may be called by a different name; and conversely, if it is not in its nature a tax, **it is not material that it may have been so called.**"

37 Cyc. verbo, Taxation, p. 709, and authorities cited.

"Everything that may be done under the name of taxation **is not necessarily a tax.**"

Cooley's Constitutional Limitations, 7th Ed., p. 695.

"An unlimited power to make any and everything lawful which the Legislature **might see fit to call taxation,** would be, when plainly stated, **an unlimited power to plunder the citizen.**"

Cooley's Constitutional Limitations, 7th Ed., p. 697, citing numerous authorities.

In the case of Accardo vs. Fontenot, supra, Judge Foster, in his opinion, says:

"The taxes and penalties provided for by Section 35 **lack every fundamental element of a tax.** The manufacture and sale of intoxicating liquor for beverage purposes are absolutely prohibited by the Eighteenth Amendment to the Constitution and the National Prohibition Act. Payment of the so-called taxes could not legalize either transaction, and the section so states. There is not the slightest pretense of raising revenue, and it should not to be presumed that Congress intended to levy a tax for the purpose of prohibition on something already prohibited. It is also exceedingly doubtful that it could do so."

The word tax has a certain well-defined meaning in law. First of all, it must have as its purpose the providing of revenue. Taxes, so called, imposed for any other purpose fall under the police power and cannot be brought within the meaning of those arbitrary rules which find their only excuse in the necessity for the prompt and unhindered collection of the sovereign's revenues. And the fact that a tax imposed for the purpose of regulation does in fact produce an excess over the cost of such regulation, cannot make it a revenue

tax (see 37 Cyc., verbo Taxation, p. 711, and authorities in foot notes).

Can it be contended for a moment that the charges created by Section 35 of the Volstead Act are for purposes of revenue?

If this be so, then we say that Congress has done an immoral and indecent thing. In one breath it has prohibited an act and denounced it as a crime; then in the next breath, with a pessimism unworthy of the foremost legislative body in civilization, it anticipates the violation of its mandate. It proposes to profit by the human frailties of its citizens and to build the national prosperity in proportion to the nation's criminal degeneracy. We submit that this Court has no right to impute to Congress such an intention in the framing of this Section 35.

Then again, if this be a tax, what is it a tax on?

Quoting from a case cited in the foot note, Cooley, in his Constitutional Limitations, 7th ed., at page 678, says:

> "In its most enlarged sense the word taxes embraces all the regular impositions made by the Government upon the **person, property, privileges, occupations and enjoyments** of the people for the purpose of raising public revenue."

Does this charge under Section 35 fit any of these objects? As an occupation tax it would be objectionable for several reasons. In the eyes of the law there can be no such occupation as the illegal sale of liquor. If we omit the word illegal the tax lacks uniformity and is destructive in amount, a vital fault in an occupation tax. None of these points, singly, must be urged at this stage of the case, but taken altogether they fortify us in the inevitable conclusion that this charge is nothing more or less than a penalty sought to be im-

posed for each commission of the acts made criminal by the statute. If a tax for revenue, it would be a tax on crime; objectionable from the viewpoint of the state because of its uncertainty as a source of revenue; objectionable from the viewpoint of the individual because of the constitutional guaranties on the subject of punishment for crime.

The proposition that a tax cannot be imposed, under our constitutional system, as a punishment for crime, seems so plain that a fairly diligent search has failed to uncover any authorities on the subject. Cooley on Taxation, 3rd Ed., Vol. 1, page 260, touches on the point in discussing license taxes, where he said:

> "But when, for any reason, it (the license tax) becomes discriminative between individuals of the class taxed and selects some for an exceptional burden the tax is deprived of the necessary element of legal equality and becomes inadmissible. It is immaterial on what grounds the selection is made: whether it be because of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted limits cannot be set to it, and it may be made use of for purposes of oppression, **or even of punishment.**"

And lastly, from a general point of view, a tax on crime would be objectionable as nationally immoral, and as bestowing upon a criminal, just because he is a criminal, a share in that privilege of citizenship under which men contribute to the support of the government in which they have reserved, in return therefor, the right of representation.

Do the general provisions of the revenue law support the theory that this charge under Section 35 is a tax?

Prior to the advent of prohibition, there were numerous offenses against the revenue laws on the subject of the manufacture of any traffic in intoxicants. Many of these were punished by fine and imprisonment, after criminal prosecution. Some inflicted, in addition, penalties against the individual or forfeiture of the property involved in the commission of the offense. Others inflicted only the penalty, or the forfeiture, or both. A good illustration is Section 3265 of the Revised Statutes, which provided in part:

> "* * * and any person who sets up any such still, etc., without first obtaining a permit from the said collector, etc., or who fails to give such notice, shall pay in either case the sum of $500, and shall forfeit the distilling apparatus thus removed or set up in violation of the law."

We can see no difference, in the character of the charge, between the $500 imposed by Section 3265 and the double tax and $500 under the Volstead Act. Both flow from a human dereliction. But did the Revenue Department assume to treat the former as a tax and collect it by distraint? Not so. The department resorted to the Courts, "in any proper form of action," as provided by Section 3213 of the Revised Statutes, and even proceeded by the strict process of indictment to collect $500 under Section 3265 in the case of U. S. v. Cradt, 43 Fed. 374.

And there lies the distinction between the two methods of procedure which the law accords the Revenue Department in the collection of its claims. The process of distraint is intended for the collection of

taxes, strictly called—those not-to-be-questioned charges against persons, property and business, in the ordinary course of affairs, through which the nation derives its regular and certain revenues.

The "impelling occasion" of the law's prohibition against the judicial hindering of the collection of such revenues lies solely in the fact that they are taxes in the strictest sense of the term.

But where the debt is not a tax, strictly speaking, the law not only does not prohibit, it invokes judicial aid.

> "It shall be the duty of every collector of internal revenue to report within ten days to the District Attorney of the district in which **any fine, penalty or forfeiture** may be incurred for the violation of any law of the United States relating to the revenue, a statement of all the facts and circumstances of the case within his knowledge, together with the names of the witnesses," etc.

Section 3164, Revised Statutes:

> "It shall be the duty of the collectors, in their respective districts, subject to the provisions of this Title, to prosecute for the recovery of any sums which may be forfeited by law. **All suits for fines, penalties and forfeitures,** where not otherwise provided for shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding qui tam or otherwise, before any Circuit or District Court of the United States, for the district within which such said fine, penalty or forfeiture may have been incurred, or before any other Court of competent jurisdiction," etc.

Section 3213, Revised Statutes:

> "The District Courts shall have original jurisdiction, as follows: * * * Of all suits and pro-

ceedings for the enforcement of penalties and forfeitures incurred under any law of the United States."

Section 24, Judicial Code.

"All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found."

Section 43, Judicial Code.

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued," etc.

Section 1047, Revised Statutes.

While we are dwelling on this point, we wish to call attention to a provision of the Volstead Act which seems to suggest the intention of Congress to treat the charges imposed by Section 35 as penalties, rather than taxes collectible by distraint, and the collection of which might not be enjoined. This is the clause of Section 35, which says:

"The Collector, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in Court," etc.

What was the reason for inserting this passage immediately after the clause imposing the double tax and $500 penalty? Does not the very sequence of thought warrant the conclusion that Congress had in

mind the collection of that penalty, as other penalties are collected—by **action in Court?**

> "Section 35 of the Volstead Act does contain in a separate clause a provision whereby contingent permission is given to the Commissioner of Internal Revenue to compromise any civil cause arising under this title before bringing action in Court. It is wholly impossible to say with certainty that the clause last above refers, among other things, to an action brought to recover the penalty provided for in the body of the section. The appositeness of the procedure, and the placing of the provision in the same section wherein the penalty is provided for, lend some color to the view that Congress meant to provide for the collection of the penalty by a civil action, which action could be, upon the contingency stated, compromised by the payment of a less amount than that written in the statute."
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> Judge Faris, in the Kausch case, supra.

In view of all of the foregoing, we therefore contend that, construing the charge under Section 35 of the Volstead Act in the light of the language of the section itself, of other passages of the Act, of the general law of taxation, and of the regulations and practice of the Revenue Department, **said charge is not a tax, and particularly it is not a tax within the intendment of Section 3224, Revised Statutes, and this Court has jurisdiction of these suits.**

As the undisputed fact was that the complainant in the case at bar had paid all taxes required by the Internal Revenue laws, the so-called tax and penalty imposed upon by section 35 could not be said to be a tax in any proper sense of the word, or a penalty for tax delinquency because he was admittedly not delinquent in this respect. It is therefore a tax upon crime,

and such a thing is scarcely conceivable. At least, as said by this Court in the License Tax Cases, 5 Wall. 462, 18 L. ed. 497:

> "It is not necessary to decide whether or not Congress may, in any case, draw revenue by law from taxes on crime. There are, undoubtedly, fundamental principles of morality and justice which no Legislature is at liberty to disregard; but it is equally undoubted that no Court, except in the clearest cases, can properly impute the disregard of these principles to the Legislature."

In Thome vs. Lynch, supra, an elaborate and carefully considered opinion was rendered by Judge Booth. On the question here discussed he concluded as follows:

> "There is nothing in Section 35 except the name 'taxes' which indicated any difference in character or purpose between the so-called taxes and penalties. Names are not controlling. While it may not always be easy to distinguish a tax from a penalty, yet where an exaction is made by governmental authority upon an occupation which is expressly prohibited as criminal by the same governmental authority, and where the exaction is not clearly shown to be made for revenue purposes, it would seem that such exaction must be classed as a penalty, if classification is to have any real meaning."

We therefore submit that under well established principles, as laid down by this Court, as well as all others, the assessments in this case were fines for the punishment of a criminal offense, and not taxes in any sense whatever.

II. THE COLLECTION OF THESE FINES OR PENALTIES BY THE METHOD ADOPTED IN THIS CASE, IS IN VIOLATION OF ARTICLES IV, V AND VI OF THE AMENDMENTS TO THE FEDERAL CONSTITUTION.

Article IV secures the right of the people against unreasonable seizures.

Article V protects all persons charged with crime and provides, inter alia, that they shall not "be deprived of life, liberty or property, without due process of law."

Article VI is as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The system adopted in the case at bar, as in thousands of other similar cases throughout the United States, tears these constitutional safeguards up by the roots and utterly destroys them.

We seriously doubt whether any legislation was ever before enacted, either by Congress or by any State Legislature, so arbitrary, ruthless and tyrannical as is contained in this Section 35 of the Volstead Act, as interpreted by the Commissioner of Internal Revenue or his legal advisers.

These assessments impose fines upon any persons that may be selected by the Commissioner to punish them for the alleged commission of crimes, even where

in many cases, some of these persons have not even been arrested under other provisions of the Volstead Act; even where in many other cases (as in the case at bar) the prosecutions are still pending and even where, as in Accardo vs. Fontenot, supra, and other instances, the persons assessed had been previously acquitted.

Nothing like this can be found elsewhere in the legal annals of this or any other civilized country.

By the words of this Section 35, these punishments may be inflicted "upon evidence of" illegal manufacture or sale. These three words are made the sole basis of the punitive assessment. What do they mean? What evidence should be necessary? An affidavit of some responsible person? A charge, with specifications, made by some named person? Or is an anonymous communication sufficient? Or merely the whisper of an enemy or a blackmailer into the ear of an enforcing agent?

No notice of any kind is given, previous to this punitive assessment, by which to afford the person accused a chance to disprove the falsity of the charge.

No opportunity is afforded the accused to confront his accuser. No chance to cross-examine witnesses, if indeed there are any. No hearing of any kind, no information or indictment or even a declaration in a civil suit. No trial by jury, supervised by a Judge or other judicial officer, capable of passing, the former upon questions of fact, the latter upon questions of law. And being convicted by an executive branch of the government without any of these constitutional preliminaries, there is, furthermore, no chance of appeal from the conviction before a Court competent to entertain it.

And, in addition to all this, it should be noted that

if such a system is to be longer tolerated, there is nothing to prevent any Commissioner from sending any number of these assessments to the same person. If one of these assessments is lawful, further assessments can be made in any number and in any aggregate amount. This alone shows the utter iniquity of the whole system.

Upon this subject we cite the following extracts from the opinions rendered by the District Judges, in some of the cases above referred to, in which it was held that Section 35 of the Volstead Act violated these Constitutional amendments. These citations are, of course, not presented as in any way controlling the decision of this Court, but as part of our argument expressed in apt and convincing language.

In Kausch vs. Moore, 268 Fed. Rep., at page 671, Judge Faris discussed the question in the following language:

> "Nothing anywhere is provided as to the nature of the evidence on which the Commissioner of Internal Revenue may act in assessing such penalty, nor as to the manner of collecting such penalty after he has assessed it. The language of the Act contains no express provision for the collection of the penalty by a civil action. Section 35 of the Volstead Act, supra, does contain in a separate clause, which I quote above, a provision whereby contingent permission is given to the Commissioner of Internal Revenue to 'compromise any civil cause arising under this title (Title II) before bringing action in court.' It is wholly impossible to say with certainty that the clause last above refers, among other things, to an action brought to recover the penalty provided for in the body of the section. The appositeness of the procedure, and the placing of the provision in the same section wherein the penalty is provided for,

lend some color to the view that Congress meant to provide for the collection of the penalty by a civil action, which action could be, upon the contingency stated, compromised by the payment of a less amount than that written in the statute.

Pursuant to other provisions of the Volstead Act, the plaintiff here may, upon conviction on the criminal side of the court, 'be fined not more than $1,000, or imprisoned not more than six months.' Section 29 of the Act of October 28th, 1919. The imposition of the double tax and of the penalty provided by Section 35, supra, are therefore in the nature of additional punishments for the same offense. In short, there exist under this act a fine, a double tax, and a penalty as punishments for one and the same offense. These considerations regarded the word 'penalty' as used in the Act, would seem to have been used by Congress in the usual and legal meaning of this word, which meaning is fairly well-settled law. A penalty is a sum of money, which the law exacts by way of punishment, for the doing of some act which the law forbids, or for the failure to do some act which the law requires to be done. It is true, as the definition foreshadows, that sometimes the word 'penalty' is undoubtedly used as a synonym of the word 'fine,' but as used in the Volstead Act it cannot be fairly so construed, because by another provision of the Act a fine as such is clearly provided for. Moreover, no authority can be conferred by Congress upon the Commissioner of Internal Revenue to impose a fine in the strict sense of that word (Wong Wing v. United States, 163 U. S. loc. cit. 237, 16 Sup. Ct. 977, 41 L. Ed. 140), a fortiori, without a trial, or any sort of hearing theretofore had, as here.

Ordinarily the well-settled procedure is that penalties are recoverable in only one of two ways: that is, either by a criminal prosecution, or by a civil action. Neither one of these methods has been or is being followed here, and so far as the

Commissioner of Internal Revenue is concerned, he has no authority to follow the former. I think the law, the status of the case, and the circumstances, as well as the argument, eliminate recovery by the Commissioner of Internal Revenue or by his agent, the defendant here, by way of a criminal prosecution. If the plaintiff is to enjoy that due process of law which the Constitution guarantees to him, the inference seems obvious. It ought to follow that recovery of this penalty cannot be had by distraint under the situation now presented. For it seems clear beyond much question that the plaintiff has not had his day in Court; that no opportunity whatever has been afforded him to contest the truth of the reports on which the Commissioner of Internal Revenue acted in assessing the penalty of $500 against him. Therefore to allow his property to be taken by distraint and sold, to pay this penalty, would in my opinion be to take it and sell it without due process of law. The questions presented do not call for a ruling as to whether the fact of a prior plea of guilty or the fact of a conviction on the criminal side of the court, would constitute such evidence of an illegal sale as would warrant the assessment and collection by distraint as here attempted. This is so because the case has not yet proceeded to that stage.' "

In Accardo vs. Fontenot, 269 Fed. Rep., at page 451, Judge Foster said:

"By this it is clear that the policy of the Internal Revenue Department is to take the punishment of offenders into its own hands, in preference to the Courts, and the cases before me well illustrate to what extremes of unfairness such a policy may lead. No charge at all against one plaintiff; another charged with only unlawful possession, which carries no penalty, under Section 35, Title 2, and an acquittal shown; the other charged with selling unlawfully, an ample bond

given to secure payment of the assessment but no trial had. Acquittal in all of these cases would be a bar to the collection of the penalties in a civil suit. If an ex parte report of a revenue or prohibition officer is all the evidence required of illegal sale or manufacture, which is very doubtful, there is a strong presumption in these cases that the prohibition officers were not in possession of sufficient evidence of even probable cause on which to base such report.

Yet payment is demanded in each case, and collection is sought to be enforced by the drastic procedure of distraint. No doubt the Commissioner of Internal Revenue considered himself amply justified in making the assessment, and the collector of Internal Revenue should not be criticised or censured for attempting to make collection. His duties are purely ministerial, and he is vested with no discretion, once the assessment is placed in his hands. But the system is all wrong and tends to work great hardship and injustice to the individual, however desirable from an administrative viewpoint it may be."

In Thome vs. Lynch, 269 Fed. Rep., at page 1005, Judge Booth said:

"Finally, the procedure by distraint for the collection of penalties, as is now threatened in the present cases, is open to grave constitutional objections. As already noted, there has been no adjudication in court as to the liability of the plaintiffs. The liability is denied. There has been no hearing. In many of the cases alleged evidence has been obtained by illegal searches and seizures. Procedure by distraint under such circumstances would not be due process of law. See McBride v. State, 70 Miss. 716, 12 South. 699.

It is true that in the case of Oceanic Navigation Co v. Stranahan, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013, it was held a valid exercise of

congressional power over immigration to provide that a fine of $100 should be paid by persons or companies bringing into the country immigrants afflicted with certain diseases, and also to provide for the imposition of the fine by an administrative officer; but the Court in its opinion pointed out that the act punishable was not declared to be an infamous crime, or a crime at all. The Court in its opinion said:

'On the face of the section which authorizes the Secretary of Commerce and Labor to impose the exaction which is complained of, it is apparent that it does not purport to define and punish an infamous crime or, indeed, any criminal offense whatever. Clear as is this conclusion from the text of Section 9, when considered alone, it becomes, if possible, clearer when the section is enlightened by an analysis of the context of the Act and by a consideration of the report of the Senate Committee, to which we have previously made reference.

Its various sections accurately distinguished between those cases where it was intended that particular violations of the Act should be considered as criminal and be punished accordingly, and those where it was contemplated that violations should not constitute crime, but merely entail the infliction of a penalty, enforceable in some cases by purely administrative action and in others by civil suit.'

The Court for this reason distinguished the case of Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct., 977, 41 L. Ed. 140, in which latter case the Court held invalid an Act of Congress providing for imprisonment at hard labor by judgment of a Commissioner, without trial, Chinese who had been adjudged by him subject to be deported. The provision of the statute was as follows:

'That any Chinese person, or persons of Chinese descent, convicted and adjudged to be not lawfully entitled to be and remain in the United

States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided.'

'The Court in its opinion said:

'But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.'

In the instant cases the alleged acts for which the Commissioner assessed the exactions under Section 35 of the National Prohibition Act are crimes, made so by said Act, and punishable by fine and imprisonment for a term of years, as provided in Section 29 thereof. It would seem illogical to consider the same acts not criminal for the purpose of assessing and collecting exactions under Section 35, and at the same time criminal for the purpose of punishment by imprisonment under Section 29. It would therefore seem that the instant cases come within the rule laid down in the Wong Wing case, and not within the rule laid down in the Oceanic Company case."

In Kelly vs. Llewellyn, 274 Fed. Rep., at page 114, Judge Orr says:

"It is clear, from the language of the section of the Act, that a distinction is drawn between taxes and penalty. It is plain, from the reading of the Act, that there is wanting any provision imposing the duty upon a collector of revenue or his subordinate to determine the liability for the penalty or to proceed of his own motion for the

collection of the same without resort to a proper court. The provisions of the second paragraph of said section with respect to the compromise of any civil cause arising under this title before bringing action into court, and as well of any such cause after action has been brought, is rather significant. The question immediately arises in one's mind: What can be compromised before or after action brought in court, unless it be that which is intended by the Act to be the subject matter of legal proceedings, and not the subject matter of administrative action?

It is hard to conceive of anything more prominently fixed by law as within the jurisdiction of the District Court than the recovery of penalties. The first Judiciary Act passed by Congress, on September 24th, 1789, gave the District Courts of the United States jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States. The provision has remained the same, and is now found in the ninth paragraph of Section 24, Chapter 2, of the Judicial Code, which went into force January 1st, 1912, in the following language:

"Sec. 24. The District Court shall have **original** jurisdiction as follows:

Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.'

Comp. St. 991."

In Ledbetter vs. Bailey, 274 Fed. Rep., at page 379, Judge Boyd said:

"Referring again to the reports upon which these assessments are based, it is an irresistible conclusion, from the character of the notices the contents of the liens filed, and the manner of assessment, that the information furnished to the taxing authorities in Washington is largely the result of unfounded opinion and alleged facts, existing

only in the minds of those who have sent in the statements. It is evident that the imaginations of these reporters in many instances have been allowed to take unrestrained flight, and have thereby reached heights inconceivable to the normal mind, and, further, the manner of the execution of the Act which we are now considering, by the agencies appointed for its enforcement, has been in many instances such as to transgress the sacred barriers provided by the Constitution for the protection of person and property in this country. The conduct of some of these subordinates has been both arrogant and ruthless, and has reached a degree which has aroused the indignation of many of the best citizens in the land."

And again, on page 380, he says:

"The framers of our organic law undertook to guard against the invasion of the rights of the citizen with respect to the liberty of his person and the sacredness of his home and property, and with this end in view provided for trial by jury, for the security of persons, houses, papers and effects against unreasonable searches and seizures, and that the property of a citizen should not be taken without due process of law. Can the proceedings which have been inaugurated and are being fostered by the federal authorities for the enforcement of the Volstead Act be upheld as due process of law, or in other words, can the provisions of the Constitution which undertake to protect property from wrongful seizure, forfeiture, or confiscation be so construed as to permit citizens to be subjected to penalties decreed in secret, without notice and without the benefit of a hearing. If so, in my opinion the meaning of the provisions of the Constitution above referred to have been misunderstood by the people.

So far the discussion of the subject in hand is intended to point out, if possible, the objectionable methods adopted by the authorities in the enforcement of the prohibition laws, in order that

such methods may be corrected. The Eighteenth Amendment is a part of the organic law of the nation, and as such should have the support of the people generally, and laws that are passed for the carrying out of the amendment, to the full extent of its purposes, should not only be sustained by public sentiment, but should have the active aid of all good citizens in their enforcement. St. Paul says: 'Let all things be done decently and in order.' This injunction could be well applied to the execution of public law."

In Turner vs. Wade, 254 U. S. 64, it was held by this Court that an assessment made by a Board of County Tax Assessors, increasing the valuation returned by the property owner, without notice or hearing, was without due process of law, where his remedy by arbitration proved abortive.

"Due process of law" is defined in Volume 8 of Cyclopedia of Law and Procedure, page 1080, as, "Such an exercise of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. It has also been defined as **A law which hears before it condemns: which proceeds upon inquiry and renders judgment only after trial.** Law in its regular course of administration through Courts of Justice. A prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. An orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights."

And see Cooley, "Constitutional Limitations," Section 356.

The right of trial by jury is preserved to every one accused of crime, who is not attached to the army, or navy, or militia in actual service.

Ex parte Milligan, 4 Wall. 2.
Eilenbecker vs. District Court of Plymouth County, 134 U. S. 31.

III.. THERE IS NO AUTHORITY FOR THE COLLECTION OF THESE SO-CALLED TAXES AND PENALTIES BY DISTRESS AND SALE, EITHER IN THE VOLSTEAD ACT OR IN PRIOR LAWS.

There is certainly no authority expressly given in the 35th section, or in any other part of the Volstead Act, for the collection of these assessments by distress and sale.

With an ingenuity worthy of a better cause some astute, but misguided, mind inspired the idea of harking back to the Revised Statutes and presumably Section 3187 (Barnes Federal Code, Section 5085).

This and following sections relating to the same subject matter are a part of the Internal Revenue laws passed for the sole purpose of assessing, regulating and collecting taxes, and taxes only.

The method of collecting penalties is by suit or indictment as hereinafter shown.

Section 3187 of the Revised Statutes is the only authority in the prior laws for a distraint for taxes. And this section specifically provides that all that can be collected by this method is **"said taxes, with five per centum additional thereto and interest."**

Even Section 35 of the Volstead Act does not pretend that the $500 item is a tax. It expressly calls it, what it really is, a penalty. Is this Court to be asked

to stultify its own intelligence and interpret this penalty to be a tax, in order to bring it under Section 3187 of the Revised Statutes? As a matter of fact, no part of the assessment is a tax. It is all of it a fine or penalty imposed as punishment for the alleged commission of a crime and none of it falls within the provisions of Section 3187 of the Revised Statutes.

It is true, it was held by Judge Faris in the Kausch case, supra, that the so-called tax could be collected by this method, but that the expressly called penalty could not.

We cannot see the soundness of this distinction. In most of the other cases above cited, this distinction was not accepted, and it was held that all the items, whether called taxes or penalties, were fines for the punishment of crimes.

In Accardo vs. Fontenot, supra, Judge Foster, at page 450, says:

> "Taking up the first question, it is well settled that Congress may impose taxes for the purpose of regulating any business or occupation, if there is the slightest color of raising revenue, and these taxes may be so excessive as to actually prohibit. An example of this is found in the Act of January 17, 1914 (Comp. St. Secs. 6287a-6287f), imposing a tax of $300 per pound on the manufacture in the United States of smoking opium. Nevertheless, if any one chose to pay the tax, he could indulge in the business. So with the internal revenue taxes. Although one might be guilty of a criminal offense by not paying his taxes promptly, still the tax is primarily intended to raise revenue.
>
> On the other hand, the taxes and penalties provided for by Section 35, tit. 2, of the National Prohibition Act, lack every fundamental element of a tax. The manufacture and sale of intoxicating liquor for beverage purposes are absolutely prohibited by the Eighteenth Amendment to the Con-

stitution and the National Prohibition Act. Payment of the so-called taxes could not legalize either transaction, and the section so states. There is not the slightest pretense of raising revenue, and it should not be presumed that Congress intended to levy a tax for the purpose of prohibition on something already prohibited. It is also exceedingly doubtful that it could do so. Cooley on Taxation (3d Ed.), p. 12, et seq. verbo 'Maxims of Policy.'

It is evident the so-called taxes and penalties provided by Section 35, tit. 2, of the National Prohibition Act, are simply additional penalties imposed for the violation of a criminal statute, and Section 3224, R. S., is no bar to relief in equity in a proper case. See Dodge v. Brady, U. S. 122, 36 Sup. Ct. 277, 60 L. Ed. 560.

On the second question the material provisions of the internal revenue laws (R. S., Secs. 3172, et seq.) relative to the assessment and summary collection of internal revenue taxes are as follows: The collector is required to canvas his district and make a list of all persons liable to tax. It is also the duty of all persons so liable to make returns under oath to the collector at stated times. If the person liable fails to make a return, the collector must summon him. If he still refuses, he may be interrogated, and in that event, or if he fails to appear, the collector can make a return for him. All this provides notice before assessment, and makes the subsequent summary collection due process of law. It is only after these proceedings that the assessment is made by the Commissioner on the return made by the party taxed, or by the Collector for him.

Manifestly, these laws could not be applicable to the collection of penalties under Section 35, tit. 2, of the National Prohibition Act. To compel a man to file a return showing him to be guilty of a crime, or to require him to answer interrogatories to the same effect, would be to compel him to tes-

tify against himself, in violation of his constitutional privilege. Formerly, under the revenue laws, he was protected by a liberal construction of R. S., Sec. 860; but that section was repealed by the Act of May 7, 1910 (36 Stat., p. 352), and the Commissioner of Internal Revenue evidently so regards them, as the assessments in the cases at bar were made entirely without notice presumably on the report of the prohibition officers.

"It is clear to my mind that Congress did not intend the summary and drastic process of distraint to be used for the collection of the penalties imposed by Section 35, tit. 2, of the National Prohibition Act. As well they might have attempted to put the whole enforcement of the law in the hands of the executive officers, and so deprive offenders of the right of trial by jury entirely.

In Thome vs. Lynch, supra, Judge Booth says:

"The second question, whether distraint is the proper method of collecting the exactions demanded, has in effect been answered in the foregoing discussion. As above shown, before the Eighteenth Amendment went into effect, the power of the collector of internal revenue to proceed by distraint was a limited power, limited to taxes proper, and certain specified penalties annexed to taxes proper. This limited power in the collector under the internal revenue laws to collect certain penalties by distraint is not enlarged by any provision of title 2 of the National Prohibition Act, but is, on the contrary, curtailed.

Title 2, Section 28, of the National Prohibition Act, confers on the Internal Revenue Commissioner and subordinate officers, for the enforcement of the National Prohibition Act, the powers which are conferred by law for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquors. Section 28, therefore, simply gives to the Commissioner and subordinate officers, the same powers of enforcement in reference to the National Prohibition Act as they had

under existing laws relating to the manufacture and sale of intoxicating liquor. These powers include the enforcement by distraint in cases of special taxes and certain penalties annexed to them under the internal revenue laws. But if, as we have seen, the exactions under Section 35 of the National Prohibition Act are none of them taxes, but all of them penalties, so far as they relate to the manufacture or sale of intoxicating liquor for beverage purposes, then it follows that Section 28 gives no power to collect these penalties by distraint.

It may be further observed that the preliminary steps provided in Section 3172, R. S. (Comp. St., Secs. 5895), and leading up to the notice and demand in Section 3184, R. S., all relating to assessment and collection of internal revenue taxes proper, to wit: The canvassing by the collector; the returns by parties liable to the taxes; the call for such returns; the summons by the collector for examination; and, upon refusal, the making of a return by the collector—were never intended and are not suitable as procedure for collection of penalties such as are prescribed in Section 35 of the National Prohibition Act. Nor, indeed, was the procedure under the sections above mentioned followed in the instant cases."

In Connelly vs. Gardner, supra, at page 912, Judge Garvin says:

"If Congress did not intend the process of distraint to be used for the collection of penalties imposed by Section 35 of the National Prohibition Act, this action cannot lie. I do not find such intention, and I think the action is well brought, and that a preliminary injunction should issue upon giving an undertaking in an amount to be determined upon the settlement of the order granting the motion."

The same distinction as made in the Kausch case was made in Kelly vs. Llewellyn, supra.

But in Ledbetter vs. Bailey, supra, as in all the other previous decisions except the Kausch and Kelly cases, this distinction was not recognized as sound, and Judge Boyd says, at page 383:

> "The conclusions of the Court are therefore that under the provisions of Section 35 of the Volstead Act taxes cannot be assessed or collected; that the double tax provided for in the Act, and the penalties prescribed, are nothing more nor less than punishment for the commission of criminal offenses; that these penalties must be collected as judgments in criminal cases; that the provisions of Section 3224 do not apply, and that these suits are not forbidden thereby; that the court has jurisdiction to entertain the suits and issue the orders of restraint or decrees for injunction sought thereby."

In Fontenot vs. Accardo, supra, the Circuit Court of Appeals for the Fifth Circuit, in affirming Accardo vs. Fontenot, supra, said:

> "There is a vital difference also in the method of enforcing the collection of assessments. Distraint proceedings were not authorized under the revenue laws until notice had been given to the person claimed to be liable, and an opportunity afforded to pay the tax. The moderate penalty of 5 per cent. could be assessed only upon failure to pay the tax within ten days after notice. Under Section 35 of the Act no notice is required to be given or opportunity afforded to pay the so-called tax before the assessment of a penalty in a considerable amount if authorized.
>
> While under the revenue laws one claimed to be liable had no means of preventing the Government from collecting a tax imposed upon him, yet it was provided by Section 3226 that he could re-

cover back by suit a tax illegally assessed and collected. But it is not contemplated by any provision of law that one who is forced to pay an illegal penalty can recover it back by suit. Nor is it the law that a penalty as such is collectible by distraint proceedings. Section 3213 makes it the duty of collectors to sue for the collection of penalties and forfeitures, and opportunity is thus afforded for a hearing and defense.

The fact that Section 35 of the Act does not provide for notice is persuasive that it was intended to assess penalties to be enforced in the usual way by fine or by suit. If it had been intended to assess taxes, no doubt a requirement of notice before distraint, levy and sale would have been provided in order to give opportunity to be heard. In Central of Ga. Ry. Co. v. Wright, 207 U. S. 127, it was held that a system of taxation by statute in Georgia, as construed by the highest court of that State, which did not allow the taxpayer an opportunity to be heard as to valuation of his property, though not returned by him, except upon allegations of fraud or corruption, did not afford due process of law; and it is stated in the opinion that 'somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' "

We therefore submit that the method attempted for the collection of these moneys by distraint and sale is wholly irregular and unauthorized and against all fundamental principles of law and justice.

IV. THE REMEDY BY INJUNCTION IS PROPER.

In this and all the other cases brought before the District Courts, the Government has invoked the pro-

visions of Section 3224 of the Revised Statutes (Barnes Federal Code, Section 5123), which is as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

This is a highly proper and reasonable enactment in all cases where the assessments are for actual taxes, intended as revenue for the support of the government. The government should not, ex necessitate, be so hindered in the collection of its revenue.

But this regulation has never been held to apply to assessments or impositions of fines, penalties or forfeitures, whether they be called taxes, or by their right names.

Moreover, the collection of even taxes has been frequently restrained where the imposition or assessment is found to be clearly irregular and oppressive.

Much of what has been said in the extracts from the opinions of the various lower courts in similar cases, already quoted, is applicable to the proposition here discussed and need not be repeated.

The case of Central of Georgia R. Co. vs. Wright, 207 U. S. 127, L. ed., Vol. 52, 134, was decided by this Court upon the question of the right to enjoin the collection of taxes, and this Court held that the collection of even bona fide taxes could be restrained where the assessment was made without due process of law.

In the opinion of Mr. Justice Day may be found the following language:

> "In view of this statute as thus construed the question made is whether due process of law is afforded where a taxpayer, without fraudulent intent and upon reasonable grounds, withholds property from tax returns with an honest belief

that it is not taxable, and the assessing officer proceeds to assess the omitted property without opportunity to the taxpayer to be heard upon the validity of the tax or the amount of the assessment, either in the tax proceedings or afterward upon a suit to collect taxes, or by dependent suit to enjoin their collection."

And again the Court said:

"Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require. Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

And further on the Court said:

"Under the scheme provided for, if the property is withheld from return, the comptroller, without notice or opportunity for hearing, must proceed to value the property, and his valuation is final and conclusive, unless the taxpayer can show a very unlikely contingency that the taxing officer has acted in bad faith in making the assessment. Against the assessment thus made there is no relief in the courts of the State upon proceedings brought to collect the taxes or by bill to enjoin their collection. The penalty of failure to return, no matter how honest or well grounded the taxpayer may have been in his belief that the property was not subject to taxation, compels him to submit to the final and conclusive assessment made by the taxing officer."

And the opinion concluded as follows:

"Reluctant as we are to interfere with the

enforcement of the tax laws of a state, we are constrained to the conclusion that this system does not afford the due process of law which adjudges upon notice and opportunity to be heard, which it was the intention of the Fourteenth Amendment to protect against impairment by state action."

The distinction clearly laid down in Encyclopedia of U. S. Supreme Court Reports, Vol. 11, "Taxation," page 530, is as follows:

> "While in general an injunction will not be granted against the collection of taxes, and mere illegality, injustice or irregularity in the tax is not ground for an injunction against its collection, unless the illegality or fatal defect does not appear on the face of the record and must be shown by evidence aliunde, injunction will be a proper remedy in a case which is not a mere case of overvaluation, where it will not lie, unless it be intentional and systematic, affecting not merely the individual complainant, as where national bank shares are illegally taxed, in which case the bank may file a bill in behalf of the stockholders, or unless fraud, **or a clear adoption of a fundamentally wrong principle is shown, and an assessment made upon unconstitutional principles, may be enjoined under certain circumstances.**"

Ogden City vs. Armstrong, 168 U. S. 224, 42 L. ed. 444, is one of many cases in which this Court sustained the right of injunction to restrain the collection of taxes, even where they were, in fact, taxes, there being no adequate remedy at law to prevent an unjust collection.

In that case this Court said:

> "It is doubtless true that the collection of a tax will not be restrained on the ground that it is irregular or erroneous. Errors in the assessment do not render the tax void; and usually there are

legal remedies for all such mere irregularities and errors as do not go to the foundation of the tax, and parties complaining must be confined to these. As was held by this Court in Dows v. City of Chicago, 78 U. S., 11 Wall. 108 (20-65): 'A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant.' "

And the following language is used in the same opinion:

"In Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 525 (28: 1098, 1102), this Court, through Mr. Justice Bradley, said: 'But it is contended that the complainant should have sought a remedy at law and not in equity. It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnished a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremedial damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy only. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayers lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity for relief.' "

A multitude of other decisions, both for and against equitable relief, rendered, as well by this Court as by the appellate courts of the various States of the Union, might be cited. They can all be reconciled with each other, as being based upon the well established distinction as to what is, and what is not, a case calling for equitable relief.

We assume that the decision of this Court in the National Prohibition cases, 253 U. S. 350, was intended to be an adjudication only of the validity of the Eighteenth Amendment and the first and second sections of the Volstead Act and not a conclusive adjudication covering the questions here presented.

We are also aware of the decision rendered by this Court on July 1st, 1921, in U. S. vs. Yuginovich, 41 Supreme Court Reporter, 551, in which this Court held that the Volstead Act, including Section 35, impliedly repealed prior provisions of law regulating offenses in connection with the manufacture or sale of liquor, inconsistent with the provisions of the Volstead Act. But we assume that the decision is not conclusive of the questions in the case at bar, because the plaintiff in error in that case invoked an entirely different question and assumed the validity of the Volstead Act for the purpose of sustaining a demurer to the indictment on the ground of an implied repeal.

In the case at bar, and under all the decisions heretofore rendered, if the assessment is not of a tax but of a fine or penalty, there is no adequate remedy at law to protect the person assessed. There is no right whatever on the part of such person to pay under protest and recover back. Upon the imposition of these fines or penalties for the alleged commission of a crime, he must pay, whether he committed a crime or not.

From this payment he has no appeal. Against the liens upon his real estate he has no redress. As was said by Judge Foster in the Accardo case, supra, the whole system attempted here is fundamentally wrong and cases arising therefrom "teem with equity."

We respectfully submit that the decree of the District Court in this case should be reversed and that the prayers for relief contained in the appellant's bill should be granted.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

ERNEST LIPKE, APPELLANT,
v.
EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE, APPELLEE.
No. 596.

BRIEF FOR APPELLEE.

STATUS.

This case comes here on appeal from a decree of the District Court of the United States for the Eastern District of Pennsylvania, sustaining a motion to dismiss the bill of complaint filed by appellant, plaintiff below. The plaintiff sought to enjoin the collector of internal revenue for the first district of Pennsylvania from proceeding to distrain for the collection of certain taxes assessed under the provisions of section 35, Title II, of the national prohibition act (act of Oct. 28, 1919, ch. 85, 41 Stat. 305, 317).

STATEMENT.

Ernest Lipke of Philadelphia, Pa., was the holder of a retail liquor dealer's permit for the year ending June 30, 1920, granted him in June, 1919, under the provisions of paragraph IV, section 3244, Revised

Statutes, for which he paid the tax of $25, provided by said statute. (R. 2.) Section 3244, Revised Statutes, reads in part as follows:

Revised Statutes, reads in part as follows:

> SEC. 3244. Special taxes are imposed as follows:
>
> * * * * *
>
> Fourth. Retail dealers in liquors shall pay twenty-five dollars. Every person who sells or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors.

The Commissioner of Internal Revenue, by virtue of the power imposed in him by section 3182, Revised Statutes (post p. 39) determined that Lipke had violated existing laws in regard to the sale of liquors, assessed against him the double tax and additional penalty in the amount of $557.29, as authorized by section 35 of the national prohibition act, and through the collector of internal revenue gave notice of such assessment and made demand for payment thereof. (R. 5–6.) The demand not having been complied with, a second demand for payment was made by the collector and notice of distraint given. (R. 8.)

Section 35 of the national prohibition act (41 Stat. 317) provides:

> SEC. 35. All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufac-

> ture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale, a tax shall be assessed against, and collected from the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

Appellant filed his bill in equity to restrain the collector from the collection of the tax and penalty and to enjoin the distraint of appellant's property. (R. 2–5.)

Motion to dismiss the bill of complaint was filed on behalf of the collector (R. 10), which motion was granted by the district court. (*Lipke* v. *Lederer*, 274 Fed. 493.) Appellant appeals to this court from the decree of the district court.

IMPORTANCE OF CASE.

In order that there may be an understanding of the importance of this case, with reference to the taxes and penalties collectable under Section 35 of

the National Prohibition Act, the court is respectfully advised that there are a large number of cases now pending in the Federal district court involving practically the identical questions presented in the case now before this court.

For the information of the court the following statistical data, supplied by the Bureau of Internal Revenue, is submitted:

1. Injunction proceedings restraining the collection of taxes are pending in about 700 cases, involving approximately $1,465,038.39.

2. Approximately $1,065,851.15 had been collected up to November 30, 1921, under the provisions of section 35. This amount would be subject to claim for refund in case of an adverse decision to the Government.

3. There was outstanding and subject to collection on November 30, 1921, including the amount involved in injunction suits approximately $42,744,510.97, assessed under the provisions of section 35.

ARGUMENT.

I.

This direct appeal is not authorized by law.

Appeals from district courts to the Supreme Court of the United States are authorized and permitted by section 238, Judicial Code. All cases not falling within the provisions of that section must be taken to the Circuit Court of Appeals.

Section 238, Judicial Code, so far as the same is material to this case, provides:

> Appeals and writs of error may be taken from the district courts * * * direct to the Supreme Court in the following cases:
> * * * * *
> in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; * * *.

Paragraph 8 of plaintiff's bill (R. 4) attempts to call into question the constitutionality of section 35 of the national prohibition act, claiming that to enforce that section of the act in the manner proposed would be a violation of plaintiff's constitutional rights. In said paragraph of the bill plaintiff states:

> If any such meaning is to be given to said section 35, your orator is advised and respectfully submits that said section 35 is unconstitutional, null and void.

The real question involved here is the construction of section 35 of the national prohibition act, and not the constitutionality of that section.

Section 238, Judicial Code, does not permit of a direct appeal to this court where the construction of a Federal law is the main question at issue. Appellant can not inject into this case the constitutional question in order to justify a direct appeal to this court. Questions raised for purposes of direct appeal

to the Supreme Court must be real and substantial and not put forward merely to justify a direct appeal (*Penn. Mut. L. Ins. Co.* v. *Austin*, 168 U. S. 685; *Goodrich* v. *Ferris*, 214 U. S. 71, 79, 81; *Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610; *Farrell* v. *O'Brien*, 199 U. S. 100.)

A case involving only a construction and not the constitutionality of a Federal statute can not be brought direct to the Supreme Court. (*Sugar Refining Co.* v. *McClain*, 192 U. S. 397; *Rakes* v. *United States*, 212 U. S. 55.)

The constitutional question presented must be the controlling question involved in the case. (*Carey* v. *Ry. Co.*, 150 U. S. 170; *Sugar Refining Co.* v. *McClain*, 192 U. S. 397.)

When independent questions of general law are raised, the Circuit Courts of Appeals have jurisdiction to hear and decide all questions. (*United States* v. *Jahn*, 155 U. S. 109.)

Whether or not a Federal question is real or substantial, or merely colorable, depends upon whether it is an open one in the Supreme Court, and, if it has been determined by that court, it is not ground for a direct appeal. (*Harris* v. *Rosenberger*, 145 Fed. 449. *Writ of certiorari denied*, 203 U. S. 591.)

Where appeals are taken in cases involving the construction of Federal statutes, although the constitutionality of the act may be drawn into question the Circuit Courts of Appeals have jurisdiction under the provisions of section 128, Judicial Code. Where an appeal presents other questions than that

of constitutional rights, the appeal may be taken to the Circuit Court of Appeals. (*Read* v. *United States*, 224 Fed. 378.)

Where a case involves both the constitutionality and construction of a Federal statute, the Circuit Court of Appeals has jurisdiction to review the judgment of the lower court. (*Sugar Refining Co.* v. *McClain*, *supra*.)

This court has generally held that the constitutionality of an act of Congress imposing a tax can not be raised in a suit in equity to enjoin the collection of said tax. Relief against illegal and unjust taxation is not an original head of equity jurisdiction. The constitutionality of an internal revenue act can not be decided in a suit to restrain the collection of the tax levied thereunder. (*Delaware Art Co.* v. *Prettyman*, Fed. Cas. No. 3767; *Dodge* v. *Osborn*, 240 U. S. 118, 121.)

A suit in equity will not lie to restrain the collection of an income tax on the ground that the act of Congress imposing the tax is unconstitutional and void. (*Robbins* v. *Freeland*, Fed. Cas. No. 11883; *Dodge* v. *Osborn*, *supra*.)

If plaintiff wishes to test the constitutionality of section 35 of the national prohibition act, he must pay his tax and follow the statutory procedure in regard to suit against the collector to recover back the amount paid on the ground that the tax was illegally assessed because the act is unconstitutional. In such a case the constitutionality of the law may

l e tested, but it can not be done in an equity proceeding to restrain collection of the tax. A suit against the collector to *recover back duties or taxes* on the theory that the law under which the duties or taxes were assessed was unconstitutional may be properly appealed to the Supreme Court. (*Downes* v. *Bidwell*, 182 U. S. 244.)

As this court has held (*Carey* v. *Ry. Co.*, *supra*; *Sugar Refining Co.* v. *McClain*, *supra*), the constitutional question presented must be the controlling question involved in the case in order to justify a direct appeal. The constitutional question can not be injected into the case to aid the appeal. A direct appeal will not lie when the only real question involved is whether the bill presents a case for equitable relief. (*Scully* v. *Bird*, 209 U. S. 481.)

This court has repeatedly held that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it. (*Shelton* v. *Platt*, 139 U. S. 591; *Pittsburgh Ry.* v. *Board of Public Works*, 172 U. S. 32; *Pacific Whaling Co.* v. *United States*, 187 U. S. 447, 451, 452.)

As the question of whether the constitutionality of a statute can be tested in an equity proceeding to enjoin the enforcement of the act has been settled by the decisions of this court, the constitutional feature of appellant's case is eliminated, leaving no ground on which to rest a direct appeal to this court.

It is submitted that the case is not properly presented to this court; that the plaintiff has attempted

to inject a constitutional question into this case to justify a direct appeal, and that the only real question involved here is the construction of a Federal statute and not its constitutionality. The appeal should therefore be dismissed.

II.

The district court did not commit error in dismissing appellant's bill.

A suit in equity to enjoin the collection of an additional tax or penalty imposed under section 35, Title II, of the national prohibition act (41 Stat. 317) can not be entertained for the following reasons:

(A) The relief prayed for is prohibited by statute.
(B) Complainant has a plain and adequate remedy at law.

(A) The relief prayed for in complainant's bill was that an injunction issue to restrain the collector of internal revenue from enforcing collection of the assessments imposed by the Commissioner of Internal Revenue under the provisions of section 35 of the national prohibition act, *supra*. The relief sought, even if otherwise justified in equity, is prohibited by a Federal statute, and the court had no power to enjoin the collection of said assessments.

Section 3224, Revised Statutes, reads as follows:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

That a suit will not lie to restrain the collection of an internal-revenue tax of any kind is well settled by this court. (*Snyder* v. *Marks*, 109 U. S. 189;

Dodge v. *Osborn*, 240 U. S. 118; *Louisiana* v. *McAdoo*, 234 U. S. 627.)

In *Snyder* v. *Marks*, *supra*, this court said (p. 192):

> Hence, when, on the addition to the section, a "tax" was spoken of, it meant that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed. It has no other meaning in section 3224. There is, therefore, no force in the suggestion that section 3224, in speaking of a "tax" means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained.

In *Dodge* v. *Osborn*, *supra*, involving the application of section 3224, Revised Statutes, the court quoted with approval from the decision in *Snyder* v. *Marks*, *supra*, and added the following (p. 121):

> And this doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it. *Shelton* v. *Platt*, 139 U. S. 591; *Pittsburgh, &c., Ry.* v. *Board of Public Works*, 172 U. S. 32; *Pacific Whaling Co.* v. *United States*, 187 U. S. 447, 451, 452.
>
> But it is contended that this doctrine has no application to a case where, wholly independent of any claim of the unconstitutionality of the tax sought to be enjoined, addi-

> tional equities sufficient to sustain jurisdiction are alleged, and this, it is asserted, being such a case, falls within the exception to the general rule. But conceding for argument's sake only the legal premise upon which the contention rests, we think the conclusion that this case falls within such exception is wholly without merit, since after an examination of the complaint we are of the opinion that no ground for equitable jurisdiction is alleged.

In *Louisiana* v. *McAdoo*, *supra* (p. 633), this court held:

> There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government.

Again in *Holland* v. *Soule*, Fed. Cas. No. 6800, the court, in referring to the application of section 3224, Revised Statutes, said:

> This section prohibits a suit to restrain the collection of any sum by authority of the

> United States *having the form and color of a tax* by any means authorized by law for the collection of taxes.

The decisions are practically uniform in holding that the collection of a tax can not be enjoined by a court of equity, not only because the injunction is prohibited by statute but because such a suit does not call for equitable relief, even though it is alleged that the act under which the tax is assessed is unconstitutional and void. (*Dodge* v. *Osborn*, 240 U. S. 118, 122; *Dows* v. *City of Chicago*, 11 Wall. 108, 109; *Robbins* v. *Freeland*, Fed. Cas. No. 11883; *Alkan* v. *Bean*, 8 Biss. 83; *State Railroad Tax Cases*, 92 U. S. 575, 613.)

In *Dows* v. *City of Chicago*, *supra*, Mr. Justice Field, in delivering the opinion of the court, said (pp. 109–110):

> Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked.

In *State Railroad Tax Cases*, *supra*, this court, considering the right of a court of equity to restrain the collection of a tax, held (p. 613):

We propose to consider these questions for a moment, because the immense weight of taxation rendered necessary by the debts of the United States, of the several States and of the counties, cities, and towns, has resulted very naturally in a resort to every possible expedient to evade its force.

It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity. *Mooers* v. *Smedley*, 6 Johns. Ch. 27; *Dodd* v. *Hartford*, 26 Conn. 239; *Green* v. *Munford*, 5 R. I. 478; *Messert* v. *Supervisors of Columbia*, 50 Barb. 190; *Dow* v. *Chicago*, 11 Wall. 108; *Hannewinkle* v. *Georgetown*, 15 Wall. 548.

(B) *The plaintiff has a plain and adequate remedy at law, and can not, therefore, be heard in a court of equity.*

The real purpose of the bill filed by plaintiff in this case is to obtain an injunction against the collection of the additional taxes or penalties imposed by the statute. The bill does not allege any ground for equitable relief, such as misrepresentation, fraud, deceit, irremediable mischief, irreparable injury, or any other ground necessary to give equity jurisdiction. As was stated in *Dows* v. *City of Chicago*, *supra* (p. 109): * * * "*There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity*

jurisdiction." And again in that case this court said (p. 112):

> The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law. And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have folfowed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action.

A "plain and adequate remedy at law" is provided an aggrieved taxpayer by sections 3201, 3220, 3226, 3227, and 3228, Revised Statutes (post, p. 41–42).

The statutes above cited constitute a "*complete system of corrective justice*" in regard to the assessment and collection of taxes or penalties under the internal revenue law. As was stated in *Cheatham et al.* v. *United States*, 92 U. S. 85, 88:

> All governments, in all times, have found it necessary to adopt stringent measures for the

collection of taxes and to be rigid in the enforcement of them.

* * * * *

In these respects the United States have, as was said by this court in *Nichols* v. *United States*, 7 Wall. 122, enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete. * * *

So also, in the Internal Revenue Department, the statute which we have copied allows appeals from the assessor to the Commissioner of Internal Revenue; and, if dissatisfied with his decision, on paying the tax the party can sue the collector; and, if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.

And again in *State Railroad Tax Cases*, 92 U. S. 575, 613, this court said:

The Government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the General Government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax, after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.

This language as applied to the application of section 3220, Revised Statutes, *et seq.*, has been quoted with approval in subsequent decisions of this court. (*Snyder* v. *Marks*, 109 U. S. 189, 194; *Dodge* v. *Osborn*, 240 U. S. 118, 121.)

If the taxpayer desires to dispute the legality of the assessment made against him by the Commissioner of Internal Revenue, the procedure to be followed by him is statutory and must be complied with. He pays the tax under protest and makes application to the Commissioner of Internal Revenue for a refund, at which time he is permitted to show to the commissioner in what way the assessment is illegal. If the commissioner determines the tax has been illegally assessed and collected, the amount will be refunded. If the application for a refund is disallowed, the complaining taxpayer has the right to bring his action at law against the collector of internal revenue to recover the amount paid to him. In this suit he may attack the legality of the assessment or the constitutionality of the law imposing the tax. The procedure is statutory (sec. 3220, R. S. *et seq.*), and affords the aggrieved taxpayer a complete and adequate remedy at law. It constitutes the "complete system of corrective justice" referred to in *Snyder* v. *Marks, supra,* and prior decisions of this court.

III.

The double tax and additional penalty imposed by section 35 of the national prohibition act are collectible as taxes under the general provisions of internal revenue laws.

At the time appellant received a permit to engage in business as a retail liquor dealer he paid a special tax of $25. Payment of this tax was required by paragraph IV, section 3244, Revised Statutes (ante p. 2). Payment of the tax was preliminary to engaging in the business of a retail liquor dealer. Said section provides that every person who sells or offers for sale liquors in less quantities than 5 gallons at a time shall be regarded as a retail liquor dealer. He will be so regarded whether he has paid the preliminary tax or not, and if he should sell illegally—that is, if he should engage in the business without securing the permit and paying the preliminary tax—he will, nevertheless, be regarded as a retail liquor dealer and be subjected to the tax, as such, and such additional taxes as the statutes may impose.

At the time the permit was secured and the preliminary tax paid (June 24, 1919, for the year ending June 30, 1920), appellant could legally engage in the business of retailing liquors. The enactment of the eighteenth amendment to the Constitution, and the national prohibition act, curtailed that right so that the continued sale of liquors for *beverage purposes* became unlawful, and subjected appellant not only to the fines and penalties imposed by court for the criminal violation of said act, but also to the addi-

tional and penal taxes prescribed by section 35 of the national prohibition act (ante pp. 2–3).

Appellant claims the amounts prescribed by section 35 are not taxes, but are penalties imposed in the nature of fines for a violation of the act, and that to enforce payment thereof as taxes would invade his constitutional rights. Paragraph 8 of plaintiff's bill contains the following averments:

> Your orator having paid his taxes in full at the time and for the amount required by the internal revenue laws is not subject to be penalized for any nonpayment of taxes or any delay in the payment thereof but, by the method adopted, is punished by a fine or penalty for the commission of a criminal offense without hearing, information, indictment, or trial by jury in violation of Articles IV, V, and VI of the amendments to the Constitution of the United States. If any such meaning is to be given to said section 35, your orator is advised and respectfully submits that said section 35 is unconstitutional, null, and void. (R. 4.)

It is believed the amount mentioned in section 35, *supra*, as a tax "in double the amount now provided by law," and the amount mentioned as "an additional penalty of $500 on retail dealers," are not in the nature of fines and penalties, but are impositions in the nature of taxation. They are "*taxes or other charges*" mentioned in this section, and must be considered in the nature of additional taxes, instead of as fines, penalties, and forfeitures as understood in the administration of criminal law.

The words "tax" or "taxes," when used in a revenue act, are construed to include any tax, special assessment, cost, interest, or penalty imposed upon property. (*Blake* v. *People*, 109 Ill. 504, 525; *State* v. *Irey*, 42 Nebr. 186; 60 N. W. 601.)

"Taxes" have been defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes (*Cit. Savings & L. Assn.* v. *Topeka*, 87 U. S. 655; *I. C. R. R. Co.* v. *Decatur*, 147 U. S. 190); or to defray the necessary expenses in administering the government (*Shean* v. *Good Samaritan Hospital*, 50 Me. 155, 158); or to *accomplish some governmental end* (*Crawford* v. *Bradford*, 23 Fla. 404; *U. S.* v. *B. & O. R. R. Co.*, 84 U. S. 322, 326.)

Taxes have been held to include any pecuniary charge imposed by the Government for the privilege of residence, or of holding property, or of exercising a calling, or of engaging in a profession or business. (*Harvey* v. *Va.*, 20 Fed. 411, 413.)

Taxation is a proportionable and reasonable assessment, which may be imposed from time to time upon persons or property. (*In re Meador*, 16 Fed. Cas. 1294, 1297.)

Under section 3224, Revised Statutes (post p. 42), declaring that no suit for the purpose of restraining the assessment or the collection of any tax shall be maintained in any court, it is held that the word "tax" includes taxes which have been illegally and wrongfully levied, as well as those which are regular

and valid. (*Miles* v. *Johnson*, 59 Fed. 38, 40; *Snyder* v. *Marks*, 109 U. S. 189, 192.)

In the latter case this court said:

> * * * Hence, when, on the addition to the section, a "tax" was spoken of, it meant *that which is in a condition to be collected as a tax*, and is *claimed by the proper public officers to be a tax*, although on the other side it is alleged to have been erroneously or illegally assessed. It has no other meaning in section 3224. There is, therefore, no force in the suggestion that section 3224, in speaking of a "tax," means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained. (Italics supplied.)

While Congress, in enacting section 35, has designated one sum as a tax or double tax, and the other sum as an "additional penalty," both are intended as a mode of taxation for the purpose of controlling illegal sales of liquor. They are taxes imposed "*to accomplish some governmental end.*"

Whatever they may be called, whether tax, double tax, penal tax, or additional penalty, they both come within the definition laid down by this court in *Snyder* v. *Marks*, *supra* (p. 192) as "*that which is in a condition to be collected as a tax*, and is *claimed by the proper public officers to be a tax.*"

They were assessed as taxes by the Commissioner of Internal Revenue under the general authority confided to him by section 3182, Revised Statutes (post

p. 39). This statute authorizes the commissioner to "*make inquiries, determinations, and assessments of all taxes and penalties* * * *." In the case before the court, the commissioner exercised his statutory authority, and upon inquiries made, determined the liability of appellant, and assessed the tax and penalty imposed by section 35 of the national prohibition act.

After exercising his statutory authority to determine liability and make assessments, the commissioner advised the proper collector of internal revenue to proceed to make collection of the assessment. It thereupon became the statutory duty of the collector "to collect all taxes imposed by law." (Sec. 3183, R. S.)

The collector gave notice and made the demand required by section 3184, Revised Statutes. Thereupon the assessment of taxes became a lien upon appellant's property. (Sec. 3186, R. S.) The tax not having been paid within 10 days after notice and demand, appellant's property became subject to distraint, which is the statutory method of enforcing the lien already attached to the property. (Sec. 3187–3190, R. S.)

This statutory procedure is applicable alike to taxes and penalties assessed in the nature of taxes by the Commissioner of Internal Revenue. Section 3182, Revised Statutes authorized the assessment of *penalties* as well as *taxes*, and the statutes relating to collection apply equally to the taxes and penalties

assessed by the commissioner. The same procedure for collection is applicable to both.

It can not be successfully claimed that sections 3182 to 3190, Revised Statutes, relating to assessment and collection of taxes and penalties, and sections 3220 to 3228, Revised Statutes, giving to the taxpayer a remedy at law to recover back taxes illegally exacted have been repealed by the national prohibition act. Such statutes are necessary to the effectual enforcement of some of the provisions of that act.

They are not inconsistent with any part of the act. That it was not the intention of Congress to repeal such statutes is plainly shown by the language used in section 35 of the act, as well as other sections hereinafter referred to.

The language of section 35 shows that the intention of Congress was to repeal no existing law unless the same was absolutely inconsistent with the provisions of the national prohibition act, and then only "*to the extent of such inconsistency.*" It is further provided by section 35 that the act shall not relieve anyone "from paying any taxes or *other charges* imposed upon the manufacture or traffic in such liquor."

In *Kausch* v. *Moore*, 268 Fed. 668 (E. D. Mo.), Judge Faris, construing section 35 of the national prohibition act, held that the double tax mentioned in that section is a tax and can be assessed by the commissioner and collected in the manner provided by statute for the assessment and collection of other taxes, and that its collection can not be restrained.

As to the "additional penalty" provided by section 35, he holds that the same is a penalty in fact, imposed as a punishment, and that it can not be assessed and collected in the manner provided for the assessment and collection of taxes. In his decision, Judge Faris said (p. 673):

> Against the collection of the taxes, eo nomine, as provided by the statute, I am of the opinion no injunction will lie, for the reasons already stated. It was the duty, however, of the plaintiff to pay all such sums as are, in section 35 of the act in question, specifically called "taxes." He could have paid such under protest and have sued to recover them back. So much, then, of the threatened distraint was warranted; and since it was the duty of the plaintiff to pay, he can not enjoin collection of the tax bill presented till he has paid all that is collectable by distraint. This is practically the universal rule in equity in all of the many jurisdictions wherein the collection of alleged illegal taxes may be enjoined. Before the plaintiff can be heard to apply for injunctive relief, he must pay or tender all lawful taxes; so here he must pay or tender all taxes eo nomine which said section 35 of the Volstead Act provides may be assessed against him. Plaintiff in his bill avers neither payment nor tender, nor does he even offer to do equity, by paying any sum or sums which may be found to be legally due from him, or collectible from him by distraint.
>
> Summing up, therefore, I think he must, as a condition precedent to injunctive relief, either

> have paid or tendered to the defendant all taxes assessed against him. He may, of course, as forecast, pay under protest, and later sue to recover back such payment. But he need not, in my view, either tender or pay the penalty specifically provided in the statute in question under that name. Against the collection of this penalty, at this time and under the circumstances existing and by the mode threatened, injunction will lie on a sufficient bill. For the reason given, however, the motion to dismiss ought to be sustained to the bill as filed.

Judge Faris contends that the double tax can be assessed by the commissioner under the power given him by the statute. This statutory authority to assess taxes is found in section 3182, Revised Statutes (post, p. 39). This statute, however, authorizes the assessment of *penalties* as well as *taxes* and requires the commissioner to certify such assessment to the proper collector, "who shall proceed to collect and account for the *taxes* and *penalties* so certified."

Judge Faris holds that the sum denominated a tax may be assessed and collected by the statutory method for the assessment and collection of taxes, but that the sum denominated a penalty does not come within such statutory procedure, and that the attempt of the collector to collect the penalty may be restrained.

If the statutory method of assessment and collection applicable to taxes applies to the one sum, it also applies to the other, for it is plain that the com-

issioner has authority, under section 3182, to sess both taxes and penalties. When such assessent is certified to the collector he "*shall proceed to llect and account for such taxes and penalties.*" oes this mean that the collector shall proceed by n action at law to collect such tax and penalty? lost assuredly not. He must proceed in the manner rovided by the statutes. (Secs. 3182, R. S., et seq., ost pp. 39–40.)

A remedy at law is provided the taxpayer, however, by sections 3220 to 3228, Revised Statutes (post pp. 41–42). The above statutes constitute not only complete system for the assessment and collection of taxes and penalties but the "complete system of corrective justice" referred to in decisions of this court heretofore cited. Not only so, but section 3224, Revised Statutes, confines the procedure to the system outlined by the statute by prohibiting the use of the equitable remedy of injunction.

In enacting section 35 of the national prohibition act Congress has remained silent on the method of procedure to assess and collect the tax and penalty provided therein.

There is no reason why Congress should reenact the numerous statutes already in force pertaining to the assessment and collection of taxes and penalties. The legislators knew the law and intended that the existing statutes should apply to the assessment and collection of the taxes and penalties provided in section 35 and for that reason made no provision in said section as to the manner of en-

forcing the same. This intention is indicated by the provision in section 35 that existing laws should not be repealed except where inconsistent with the act. Congress undoubtedly intended that the tax and penalty provided in section 35 should be assessed and collected in the manner provided by existing laws, and did not intend that resort should be had to any other procedure.

The decisions of the district courts, construing section 35, have not been harmonious. A number of such decisions have held that both the double tax and the additional penalty are penalties imposed as punishment for a violation of the act, and can not, therefore, be collected by the statutory method of assessment, notice, demand, and restraint for failure to pay. (*Thome* v. *Lynch*, 269 Fed. 995; *Accardo* v. *Fontenot*, 269 Fed. 447; *Ledbetter* v. *Bailey*, 274 Fed. 375.)

The theory upon which the decisions in the cases above cited have rested is that the national prohibition act repeals laws relating to the same subject in existence at the time of the passage of that act; that the amounts named in section 35 are penalties and not taxes, and that being penalties they can not be assessed and collected in the manner provided for the assessment and collection of internal revenue taxes, but that suit must be brought for the recovery of such penalties, evidence produced of the violation of the law, and upon a verdict of guilty the penalties shall be imposed by the court. The above method of procedure seems to be the theory on which appel-

lant bases his suit to enjoin the collection of the tax and penalty imposed by section 35. It is the construction which appellant requests be given to that section.

That this whole theory is erroneous at once becomes apparent upon a careful study of section 35 of the national prohibition act in connection with internal revenue laws in existence at the time that act became effective.

Section 35 provides that "upon evidence of such illegal manufacture and sale a tax shall be assessed against and collected from the person responsible." Under the construction given this section by the decisions hereinbefore cited, and by appellant, this would mean that "evidence" must be submitted to a jury and upon the accused being found guilty the court would impose a penalty or fine in an amount equal to double the tax and an additional penalty of $500. This language can not be so construed, when read in connection with the existing internal revenue laws, which have not been repealed "unless inconsistent with this act."

The language above quoted means that upon evidence of the illegal manufacture or sale being submitted to the Commissioner of Internal Revenue, he may, under the power given him by section 3182, Revised Statutes, *determine* whether the law has been violated, and if he determines that there has been a violation, he may make "*assessments of all taxes and penalties*" and direct the collector to proceed in the manner provided by the statute to collect

such assessments from the person responsible for such illegal manufacture or sale.

To construe the language of section 35 as imposing penalties in the nature of fines would be to hold that the offender is subject, under the national prohibition act, to a double punishment, there being other sections of the act fixing the punishment for the criminal violation of the act.

There is no mystery of meaning nor ambiguity of terms in section 35 when read in connection with existing laws applicable to the assessment and collection of internal revenue taxes.

Adopting the construction given by the district courts, hereinbefore referred to, and the construction necessarily imputed by appellant's bill, the phrase that "upon evidence of such illegal manufacture or sale a tax shall be assessed against and collected from the person responsible" would be meaningless. If evidence of violation of the law must be submitted to a jury and a conviction secured, then the court would impose a fine, and the language of the statute would so state, as it has throughout the act where reference has been made to punishment for criminal violation of the act. If this had been the intent of the legislative body, appropriate language showing that intent would undoubtedly have been used.

That the double tax and additional penalty imposed by section 35 are not penalties imposed for criminal violations of the act is further shown by the following expression found in said section: "The payment of such tax or penalty shall give no right to

engage in the manufacture or sale of such liquor, or relieve anyone from *criminal liability* * * *." It is here recognized that the offender may incur a criminal liability and also be subject to the tax and "additional penalty" to be assessed by the Commissioner and collected by the collector of internal revenue as provided by existing laws.

It is so well settled that a person may be subject to a fine for a criminal violation and at the same time liable for a tax or penalty that it is not considered necessary to cite authorities to sustain that proposition.

That existing statutes applicable to the subject matter, which have not been repealed, should be read in connection with the provisions of the national prohibition act is further shown by reference to section 28, Title II, and section 18, Title III, of the national prohibition act. The sections referred to are quoted below:

> SEC. 28. The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.
>
> SEC. 18. All administrative provisions of internal revenue law, including those relating to assessment, collection, abatement, and refund of taxes and penalties, and the seizure

> and forfeiture of property, are made applicable to this title in so far as they are not inconsistent with the provisions thereof.

Section 18, *supra*, specifically applies internal revenue laws, relating to the assessment, collection, and refund of taxes and penalties, to the national prohibition act. Section 18, when read in connection with section 35 of the act and other statutes relating to the assessment and collection of taxes, negatives appellant's contention that the "additional penalty" mentioned in section 35 is a penalty and not a tax, and, therefore, can not be assessed and collected in the ordinary method provided by the statute.

That the double tax and additional penalty mentioned in section 35 are taxes, or to be considered in the nature of taxes and collected as such, is shown by the interpretation which Congress itself has given to this section.

In substantiation of this proposition the court's attention is invited to the first paragraph of section 5 of the act approved November 23, 1921 (Public, No. 96, 67th Congress), entitled "An act supplemental to the national prohibition act," which reads, in part, as follows:

> SEC. 5. That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws, that were in force when the national prohibition act was enacted shall be and continue in force, as to both beverage

> and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provisions of the national prohibition act or of this act. * * * All taxes and tax penalties provided for in section 35 of Title II of the national prohibition act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

The language of the act above quoted ought to be sufficient to remove any doubt as to what Congress intended in the enactment of section 35 of the national prohibition act.

That the double tax and additional penalty mentioned in section 35 of the act are to be considered in the nature of and having the color of taxes, and should be assessed and collected in the manner provided for the assessment and collection of internal revenue taxes, is believed to be based on sound reason and substantiated by a close analysis of the various statutes applicable. That the amounts named in section 35 are taxes or have the color of taxes, and their collection can not be enjoined by a court of equity, has been decided by the lower courts in the following cases: (*Ketterer* v. *Lederer* (D. C.), 269 Fed. 153, 1010; *Regal Drug Corp.* v. *Wardell* (C. C. A., 9th Cir.), 273 Fed. 182; *Pumilli* v. *Riordan* (D. C.), 275 Fed. 846; *Violette* v. *Walsh* (D. C.), 272 Fed. 1014; *Kelly* v. *Lewellyn*, 274 Fed. 108.)

It is believed the decisions in the cases last above cited are based on sound reasoning and a proper interpretation of the statutes.

In *Ketterer* v. *Lederer*, 269 Fed. 1010, 1011, Judge Dickinson, of the Eastern District of Pennsylvania, in dismissing the bill to enjoin the collector of internal revenue from collecting the amounts named in section 35, said:

> The act of Congress authorized and directed the defendant to make the assessment against the plaintiff, which was made upon the finding of facts as made. Congress has called this a tax, and directed it to be assessed and collected as such. If Congress had the power to impose this tax, it had the power to declare the occasion for the levy of the tax, and the mode of levy, and upon what fact conditions it should be levied. The bill of complaint calls upon us to make the finding that what Congress has solemnly declared it authorized to be done was not what it authorized to be done but something entirely different. In other and plain words, that although Congress declared it was levying and collecting a tax, it was in fact not levying a tax, but punishing the one who was called a taxpayer for an act which he had committed and which Congress had pronounced to be criminal. We decline to make this finding.

In *Pummilli* v. *Riordan*, *supra*, Judge Hazel, of the Western District of New York, handed down a well-considered opinion wherein he held that the internal-revenue laws relating to the assessment and

collection of taxes have not been repealed by the national prohibition act, and that the collection of taxes and penalties imposed by section 35 of the act can not be restrained by a court of equity. Judge Hazel said (pp. 847–848):

> It seems reasonably clear that Congress intended to repeal only such parts of the existing laws as are inconsistent with this act, while any provisions remaining in harmony therewith were retained. For violating the Volstead Act by manufacturing or dealing in intoxicating liquor a person is not relieved from paying taxes or other charges imposed by the commissioner simply because he also subjects himself to criminal liability. Although no tax receipts are issuable by the collector of internal revenue in advance, or licenses granted for manufacturing or dealing in such liquor, still persons who disobey the law subject themselves to a double liability, viz, punishment for criminal violation and assessment of a tax against them to be collected as section 35 states, "from the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers." Such a provision for both a civil remedy and a criminal punishment is not void. *U. S.* v. *One Ford Automobile and Fourteen Packages of Distilled Spirits* (C. C. A.), 262 Fed. 374.
> * * *
> Congress is presumed to have been familiar with the law that no suit for the purpose of

> restraining the assessment or collection of any tax is maintainable in any court, and no doubt purposely retained the enforcement of the taxing feature for illegal manufacture or sale according to the existing revenue laws. * * *
>
> The sole question is whether the tax and charges for illegal dealing imposed by the Commissioner of Internal Revenue under the provisions of the act are collectible by the mode of procedure prescribed by the existing internal revenue law, or whether its enforcement is required by criminal prosecution or in a civil action. The answer is that the procedure for collecting the taxes assessed for the illegal manufacture or sale of liquor with the additional penalty is governed by the internal revenue law, and such procedure in my opinion is not inconsistent with the national prohibition act, and is not repealed by implication.

In *Violette* v. *Walsh*, *supra*, Judge Bourquin, District Court, Montana, considering section 35 of the national prohibition act as it applies to the illegal manufacture of liquor, held that the double tax and penalty imposed by that section have the *color of taxes* and are collectible under the provisions of law applying to the collection of other taxes. Judge Bourquin held (p. 1015–1016):

> The tax is on a lawful occupation, and is none the less legal because the occupation is pursued by unlawful means to unlawful ends. A defendant will not be heard to say he was manufacturing for beverage purposes. It is no defense to one crime that defendant in-

tended or committed another. As well might an auto owner resist his license tax because he devoted his car exclusively to unlawful whisky running. A defendant can not plead his own wrong to excuse another charged. That plaintiff is indicted for illicit manufacture and may be acquitted is not material. The indictment does not absolve defendant of his duty to collect (see *Harding* v. *Woodcock*, 137 U. S. 47, 11 Sup. Ct. 6, 34, L. Ed. 580), and an acquittal would not relieve plaintiff of his obligation to pay; *for the taxes are not penalties, fines, or forfeitures, in the sense understood in the criminal law.*

But, even if the earlier law is repealed, since the defendant holds otherwise and is pursuing his general jurisdiction over the subject matter, to determine occupation, taxable persons, character and amount of the tax, since his assessment is of the color of a tax, and he claims it is valid, section 3224 forbids that he be restrained, even as it does if the law be unconstitutional. The reasons are obvious and need not be detailed. See *Dodge* v. *Osborn*, 204 U. S. 121, 36 Sup. Ct. 275, 60 L. Ed. 557; *Snyder* v. *Marks*, 109 U. S. 193, 3 Sup. Ct. 157, 27 L. Ed. 901.

The only remedy plaintiff has, if he be not subject to the tax, is that provided by law, viz, payment, appeal, suit for refund, and perhaps against defendant individually if he acts illegally and in bad faith. *Pacific, etc., Co.* v. *U. S.*, 187 U. S. 453, 23 Sup. Ct. 154, 47 L. Ed. 253. But for the time being defendant determines the law as well as the fact. Whether

> or not section 3224 also applies to penalties illegally claimed; whether or not in the instant case the penalties are part of the tax, is not for determination herein, but only in a case wherein the tax has been at least tendered. See *Kausch* v. *Moore* (D. C.), 268 Fed. 673.
>
> The motion to dismiss is granted.

In the opinion of this court recently handed down in the case of *U. S.* v. *Yuginovich*, 256 U. S. ——, nothing is to be found which is contrary to the conclusions reached in the decisions last above quoted and the constructions contended for herein. In the Yuginovich case this court said:

> That Congress may under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished we have no question. The fact that the statute in this aspect had a moral end in view as well as the raising of revenue presents no valid constitutional objection to its enactment.

In that case, however, this court was called upon to decide whether a penalty or punishment denounced by a prior law was applicable as punishment for a violation of the national prohibition act. This court held that the language in section 35 did not show evidence of the intention of Congress to "inflict for such an offense the punishment provided in section 3257 with the resulting forfeiture, fine, and imprisonment, and at the same time to authorize prosecution and punishment under section 35 enact-

ing *lesser and special penalties* for failing to pay such taxes * * *." The court further said:

> We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in section 3257 in addition to the specific provision for punishment made in the Volstead Act.

CONCLUSION.

It is submitted that this appeal is not properly before this court. If it is held that the appeal has been properly brought, then it is submitted that appellant is not entitled to the relief prayed for in his bill because (*a*) the relief prayed for is prohibited by statute; (*b*) the bill does not state grounds for equitable relief; and (*c*) complainant has a plain and adequate remedy at law.

It is further submitted that the amounts mentioned in section 35 of the national prohibition act as a double tax and an additional penalty are in fact taxes, or in the nature of taxes, or have the form and color of taxes, and are collectible as such; that section 35 should be read in connection with existing administrative statutes relating to the assessment and collection of taxes and penalties imposed by internal revenue laws, under which the commissioner has the authority to determine the amount due, and upon such determination and direction from the commis-

sioner the collector is bound to proceed in the statutory manner to collect the same; and further that such collection can not be restrained by a court of equity.

JAMES M. BECK, *Solicitor General.*
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
HARVEY B. COX, *Attorney.*

MARCH, 1922.

APPENDIX.

Sections of the Revised Statutes pertaining to the assessment by the commissioner and collection by the collector of internal revenue of taxes and penalties:

"SEC. 3182. The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue act, where such taxes have not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified. * * *

"SEC. 3183. It shall be the duty of the collectors, or their deputies, in their respective districts, and they are authorized, to collect all the taxes imposed by law, however the same may be designated. And every collector and deputy collector shall give receipts for all sums collected by him, excepting only when the same are in payment for stamps sold and delivered; but no collector or deputy collector shall issue a receipt in lieu of a stamp representing a tax.

"SEC. 3184. Where it is not otherwise provided, the collector shall in person or by deputy, within ten days after receiving any list of taxes from the Commissioner of Internal Revenue, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business,

or to be sent by mail, stating the amount of such taxes and demanding payment thereof. If such person does not pay the taxes within ten days after the service or the sending by mail of such notice, it shall be the duty of the collector or his deputy to collect the said taxes with a penalty of five per centum additional upon the amount of taxes, and interest at the rate of one per centum a month."

"SEC. 3186. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person: * * *

"SEC. 3187. If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, including stocks, securities, and evidences of debt, of the person delinquent as aforesaid: * * *

"SEC. 3188. In such case of neglect or refusal, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the said lien exists, for the payment of the sum due as aforesaid, with interest and penalty for nonpayment, and also of such further sum as shall be

sufficient for the fees, costs, and expenses of such levy."

"SEC. 3201. Any person whose estate may be proceeded against as aforesaid shall have the right to pay the amount due, together with the costs and charges thereon, to the collector or deputy collector at any time prior to the sale thereof, and all further proceedings shall cease from the time of such payment."

Sections of the Revised Statutes pertaining to the refund of taxes, and suits for the recovery back of taxes wrongfully collected:

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty: *Provided*, That where a second assessment is made in case of a list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded, or paid back, unless it

is proved that said list, statement, or return was not false or fraudulent, and did not contain any understatement or undervaluation."

"SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

"SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been colcolled without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner at any time within the period limited in the next section.

"SEC. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: * * *

"SEC. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or

of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June sixth, eighteen hundred and seventy-two, may be presented to the commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date."

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In the Supreme Court of the United States

OCTOBER TERM, 1921.

ERNEST LIPKE, APPELLANT, *v.* EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania.	No. 596.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of the appellee, and respectfully moves the court to advance the cause for argument on Monday, March 6, 1922, or as soon thereafter as convenient.

This cause arose by the filing in the District Court for the Eastern District of Pennsylvania of a bill of complaint wherein it was prayed that an injunction issue restraining the appellee, who is the Collector of Internal Revenue, from proceeding to collect by distraint the taxes and penalties imposed under section 35, Title II, of the National Prohibition Act (41 Stat. 305). The prayer for an injunction was denied and the bill dismissed.

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Generally speaking, the question is, is the double tax and penalty laid by section 35, Title II, of the National Prohibition Act, upon persons responsible for the illegal manufacture and sale of liquor, within the inhibition of section 3224 of the Revised Statutes, which provides that no suit shall be maintained in any court for the purpose of restraining the collection of any tax?

The determination of the question is of great importance to those officials charged with the enforcement of the revenue laws and the National Prohibition Act, as well as to that portion of the public who are affected by taxes laid upon the liquor traffic.

Bills for injunctions against Collectors of Internal Revenue are being filed in great numbers in the various districts, and it is highly desirable that an authoritative ruling be secured.

Counsel for appellant concur in this motion.

JAMES M. BECK,
Solicitor General.

DECEMBER, 1921.

○

Counsel for Parties.

LIPKE *v.* LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 596. Argued March 21, 22, 1922.—Decided June 5, 1922.

1. In a suit to restrain revenue officers from seizure of property under color of an act of Congress, a substantial claim that the act, as construed and sought to be applied by them, is unconstitutional, will support a direct writ of error from this court to the District Court. P. 560.
2. The so-called taxes retained in force and imposed by § 35 of the National Prohibition Act upon dealing in liquor prohibited and made criminal by the act, are in reality a penalty, and cannot be enforced by distraint of the offender's property without first affording him a due opportunity for a constitutional hearing. P. 561.
3. Revised Statutes, § 3224, forbidding suits to restrain assessment or collection of any tax, and the statutory remedy of payment and action to recover, are inapplicable to such a case; and the person affected is entitled to relief by injunction, for want of an adequate legal remedy. P. 562.

274 Fed. 493, reversed.

APPEAL from a decree of the District Court dismissing a bill to restrain the collection by distress, sale or otherwise, of amounts assessed as taxes and penalties under the National Prohibition Act.

Mr. Lincoln L. Eyre, with whom *Mr. Francis J. Maneely* and *Mr. Otto A. Schlobohm* were on the brief, for appellant.

Mrs. Mabel Walker Willebrandt, Assistant Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Harvey B. Cox* were on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Relying upon *Ketterer* v. *Lederer*, 269 Fed. 153, the court below dismissed the bill, upon motion, for want of equity, 274 Fed. 493, and the cause is here by direct appeal.

The bill alleges:

That complainant Lipke paid all internal revenue taxes required by the laws of the United States for the year ending June 30, 1920; and he holds a retail liquor license issued by the Court of Quarter Sessions, County of Philadelphia, for the year ending May 31, 1921. On December 29, 1920, he was arrested for selling liquor contrary to the National Prohibition Act and gave bail to appear and answer in the United States District Court. This prosecution is still pending.

That on March 18, 1921, complainant received a written communication from the defendant which stated: "Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within 10 days after date of this notice, a penalty of 5 per cent. of the amount of tax due will be added, plus interest at the rate of 1 per cent. per month until paid." The total assessment amounted to $557.29, made up of three items indicated thus—"R. L. D. Sec. 35 D. T. 45.83; 11 Mos. 21 3244 P. 11.46; S. F. P. A. 1–26–21 S. P. 500.00."

That on March 31st he received a second written demand for $557.29 with penalty of 5 per cent. for failure to pay within prescribed time. And he was advised "If payment of tax and penalty is not received within 10 days, collection of the same, with any accrued interests thereon and costs, shall be made by seizure and sale of property."

That "In addition to the notice printed on said so-called tax bills, that the property of your orator will be

seized and sold for non-payment, your orator has been informed by officials of the defendant department that after the expiration of ten days from the rendition of said second notices, his property will be seized and sold by warrant of distress. . . . He is now subject, at any moment to have the defendant, as Collector of Internal Revenue, seize his property, real or personal, for the non-payment of said fines and penalties and that he is wholly without adequate remedy at law to prevent such seizure of his property."

That § 3244 Rev. Stats.,[1] has no application; § 35 of the Prohibition Act confers no such power as the Collector seeks to exercise; and he is undertaking to punish complainant by fine and penalty for an alleged criminal offense without hearing, information, indictment or trial by jury, contrary to the Federal Constitution. If the latter section has the meaning ascribed to it by the defendant, it is unconstitutional.

The prayer is for an injunction restraining the defendant from proceeding to collect the sum demanded by warrant of seizure, distress or sale or otherwise, and requiring a cancellation of the so-called "tax bills."

Appellant maintains that the demand upon him was not for taxes, but for a penalty for an alleged criminal act; that the method adopted for enforcing this penalty is contrary to the Federal Constitution; and that if construed as appellee insists it should be, § 35 is unconstitutional.

Appellee maintains that the cause involves only questions of construction and, therefore, the appeal should be

[1] Sec. 3244. Special taxes are imposed as follows:

* * * * *

Fourth. Retail dealers in liquors shall pay twenty-five dollars. Every person who sells, or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors.

dismissed; that § 3224, Rev. Stats.,[1] prohibits the relief prayed; that the bill states no ground for equitable relief; and that full, adequate and complete remedy may be had at law.

The cause is properly here by direct appeal from the District Court. Appellant claimed that as construed and sought to be enforced by the Collector, § 35 of the Prohibition Act conflicts with the Federal Constitution. The point is substantial and sufficient to support our jurisdiction. *Towne* v. *Eisner*, 245 U. S. 418, 425; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *South Covington & Cincinnati Street Ry. Co.* v. *Newport ante*, 97.

The National Prohibition Act, c. 85, 41 Stat. 305, is entitled "An Act To prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries." "It is a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes." *United States* v. *Yuginovich*, 256 U. S. 450. "Title II—Prohibition of Intoxicating Beverages"—contains thirty-nine sections.

"Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

* * * * *

[1] Sec. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

"Sec. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

* * * * *

"Sec. 35. All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

"The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced."

The mere use of the word "tax" in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. *Child Labor Tax Case, ante,* 20. When by its

very nature the imposition is a penalty, it must be so regarded. *Helwig* v. *United States,* 188 U. S. 605, 613. Evidence of crime (§ 29) is essential to assessment under § 35. It lacks all the ordinary characteristics of a tax, whose primary function " is to provide for the support of the government " and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. *O'Sullivan* v. *Felix,* 233 U. S. 318, 324.

The Collector demanded payment of a penalty and § 3224, which prohibits suits to restrain assessment or collection of any tax, is without application. And the same is true as to statutes granting the right to sue for taxes paid under protest. A revenue officer without notice has undertaken to assess a penalty for an alleged criminal act and threatens to enforce payment by seizure and sale of property without opportunity for a hearing of any kind.

Section 35 prescribes no definite mode for enforcing the imposition which it directs, and, if it be interpreted as above stated, we do not understand counsel for the United States claim that relief should be denied to the appellant. Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for hearing—this is essential to due process of law. *Central of Georgia Ry. Co.* v. *Wright,* 207 U. S. 127, 136, 138, 142. And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded. See *Fontenot* v. *Accardo,* 278 Fed. 871. A preliminary injunction should have been granted.

The decree of the court below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE BRANDEIS, dissenting, with whom MR. JUSTICE PITNEY concurs.

The suit is in equity. So far as appears, the plaintiff had a full, adequate and complete remedy at law; and there was no danger of irreparable injury. The relief should, therefore, be denied, whatever the construction of § 35, Title II, of the Volstead Act, and even if it be deemed unconstitutional. Compare *Bailey* v. *George*, *ante*, 16.

Plaintiff describes himself as a retail liquor dealer in Philadelphia who had paid the federal special tax for the year ending June 30, 1920, and held a license under the Brooks Law which did not expire until May 31, 1921. On December 29, 1920, he was arrested under § 2, Title II, of the Volstead Act for illegally selling liquor; and the prosecution is still pending. On March 18, 1921, he received from the Collector of Internal Revenue a "Notice and Demand for Tax"; and on March 31, 1921, a second notice. By the latter he was informed that, if he did not pay the alleged tax within ten days, collection would be made by seizure and sale of his property. The amount demanded is $557.29, made up of three items: one for $45.83 for double tax under said § 35; another of $11.46 called penalty under § 3244 of the Revised Statutes; and a further amount of $500.00 "special penalty" under said § 35. This suit against the Collector was commenced May 25, 1921. The plaintiff says that there is in law no authority to levy this alleged tax and the penalties; that the claim is in fact not for a tax, but for fines; that the so-called "Notice and Demand for Tax" is in fact an attempt to inflict punishment without a hearing and without judicial trial; "and that he is wholly without adequate remedy at law to prevent such seizure of his property."

The claim is for a small sum. For aught that appears plaintiff might readily pay it under protest and bring an

action against the Collector to recover the amount paid. If he does not wish to pay, he can let the distraint be made and then sue for the trespass incident to wrongful distraint. And if personal property should be seized, he may replevy it. There is in the bill no allegation that the plaintiff is unable to pay the small amount claimed by the Government; nor of fraud or oppression or abuse of process on the part of the Collector; nor that a cloud will be cast upon title to real estate; nor that the property subject to distraint is of such a character that if distrained it will be sacrificed; nor that a proceeding in equity is necessary to prevent multiplicity of suits.

If the sum assessed against the plaintiff is a tax legally due, distraint by the Collector is a permissible and long sanctioned method of collection. Revised Statutes, §§ 3187–3216; *Hartman* v. *Bean*, 99 U. S. 393, 397; *Blacklock* v. *United States*. 208 U. S. 75. Compare *Scottish Union & National Insurance Co.* v. *Bowland*, 196 U. S. 611, 632. If it is in its nature a tax, but is claimed to be an unconstitutional one, still, particularly in view of Rev. Stats. § 3224, suit will not lie to restrain its collection. *Snyder* v. *Marks*, 109 U. S. 189; *Dodge* v. *Osborn*, 240 U. S. 118. And if the contention is that the Government's demand is not for a tax at all, but for a fine, and that, therefore, Congress lacks power to confer upon the Collector authority to collect it by distraint, still equity should not grant relief, because the bill fails to allege any fact showing that the legal remedy would not be adequate or that there is danger of irreparable injury.[1] Whether the Government's demand be deemed one for a fine or for a tax

[1] Compare *Dows* v. *Chicago*, 11 Wall. 108; *Shelton* v. *Platt*, 139 U. S. 591; *Pittsburgh, etc., Ry.* v. *Board of Public Works*, 172 U. S. 32; *Arkansas Building & Loan Association* v. *Madden*, 175 U. S. 269; *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681; *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481.

which is unconstitutional, legal remedies are available; and there is, therefore, lack of jurisdiction in equity. We have here, at the worst, the case of a threatened distraint which it is contended will be wrongful if made; a case not differing in substance from wrongful distraint by landlords or other wrongful distraint by tax collectors; and not differing in substance from wrongful attachment. In all these cases, as has long been settled, the owner of the property of which seizure is threatened is not entitled to relief in equity, unless it appears that there is no plain, adequate and complete remedy at law.

Whether the action of the Government is lawful depends upon the construction of a statute; and on this question the lower courts have differed. As was said by this court in *Arkansas Building & Loan Association* v. *Madden*, 175 U. S. 269, 274: "It is quite possible that in cases of this sort the validity of a law may be more conveniently tested, by the party denying it, by a bill in equity than by an action at law; but considerations of that character, while they may explain, do not justify, resort to that mode of proceeding." If the Government is proceeding without warrant in law, the plaintiff should, of course, have redress. An early determination of the constitutional question presented would be desirable. But, in my opinion, we cannot properly decide it in this case.